Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

SCHNUCK MARKETS, INC.,

Petitioner,

v.

GERALD MARX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether proximity in time between an adverse employment action and protected activity alone can establish a material question of fact in a retaliation case where an employer has articulated a legitimate, non-retaliatory business reason for its actions and the plaintiff has not produced sufficient evidence to rebut the employer's legitimate, non-retaliatory business reasons.

2. Whether the evidentiary scheme set forth in *McDonnell Douglas v. Green* as interpreted by *St. Mary's Honor Center v. Hicks* applies to a FLSA retaliation case as it applies to all other cases of retaliation for an employee's activity under other protective statutes.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Schnuck Markets, Inc., respectfully prays that a writ of certiorari be issued to review the judgment for the Tenth Circuit Court of Appeals entered in this proceeding February 7, 1996.

OPINIONS BELOW

The ruling of the United States District Court for the District of Kansas which granted Schnucks' motion for summary judgment is reported at 863 F.Supp. 1489 (D. Kan. 1994). The ruling of the United States District Court for the District of Kansas which denied Marx's motion for reconsideration is reported at 869 F.Supp. 895 (D. Kan. 1994). The ruling of the Tenth Circuit Court of Appeals which reversed the District Court's grant of summary judgment is reported at 76 F.3d 324 (10th Cir. 1996). The decisions are reprinted in Appendices A-C, infra.

STATEMENT OF JURISDICTION

The decision of the Tenth Circuit Court of Appeals was entered on February 7, 1996. This Court's jurisdiction to consider civil cases in the courts of appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The non-retaliation clause of the Fair Labor Standards Act as set out below:

29 U.S.C. § 215. Prohibited acts; prima facie evidence.

. . .

(a) . . . it shall be unlawful for any person –

. . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter

. . .

STATEMENT OF THE CASE

The Plaintiff below, Gerald Marx ("Marx"), filed a complaint in the United States District Court for the District of Kansas against Defendant, Schnuck Markets, Inc. ("Schnucks"), on September 14, 1993, alleging that Schnucks discriminated against him in violation of the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. §§ 621-631 by demoting and transferring him from his position as dairy/frozen food manager at Schnucks' store in Shawnee, Kansas because he lied during a Company investigation. The jurisdiction of the district court was invoked under the ADEA and under 28 U.S.C.

§ 1331. By leave of court, Marx filed an amended complaint on November 30, 1993, alleging that Schnucks by this same action discriminated and retaliated against him in violation of the Fair Labor Standards Act ("FLSA"), § 215(a)(3).

On June 27, 1994, Schnucks terminated Marx's employment based upon its established practice of terminating individuals who falsify employment documents and for lying at his depositions connected with the instant case.[1] Marx at the pre-trial conference moved to amend the pre-trial order to reflect claims relating to his termination, but did not file an amended complaint. The pre-trial order entered September 22, 1994 does reflect the termination.

Schnucks filed a motion for summary judgment as to Counts I and IV of Marx's complaint on July 18, 1994. (Counts II and III were settled by the parties.) On September 30, 1994, the District Court entered summary judgment in favor of Schnucks on Counts I and IV. (Appendix A). Marx filed a motion for reconsideration on October 17, 1994 which the District Court denied by order entered November 21, 1994. (Appendix B). On December 21, 1994, Marx filed a notice of appeal in the District Court appealing from both the order granting summary

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[1] On October 4, 1992, Terri Lynn Marx, Mr. Marx's wife, reported to Schnucks that she believed the Company was failing to pay overtime. On November 24, 1992, Marx and his wife filed a class action lawsuit against Schnucks in Kansas state court alleging wage and hour violations. The class action was voluntarily dismissed on May 5, 1994.

judgment on September 30, 1994 and from the order denying his motion to reconsider on November 21, 1994.

Marx appealed from the trial court's order granting summary judgment to Schnucks on his retaliation claim and his age discrimination claim. A Tenth Circuit panel consisting of Judges Seymour, McKay, and Lucero, in an opinion written by Judge Lucero, sustained the District Court's grant of summary judgment on Marx's ADEA claim. The Court, however, reversed the District Court's order granting summary judgment to Schnucks on Marx's retaliation claim.

The facts concerning Schnucks' reasons for demoting and discharging Marx are of particular importance and are stated here for the Court.

On February 12, 1993, Traci Stephenson, a female associate at Schnucks, filed a complaint alleging that Marx was harassing and intimidating her during working time in relation to his lawsuit and a wage and hour survey being conducted by the Company. Ms. Stephenson complained that Marx's behavior was affecting her performance, and that she thus modified her work schedule in an effort to avoid him. (Aplee. Supp. App. 86-89) On February 15, 1993, Schnucks gave Marx a questionnaire concerning Ms. Stephenson's allegations. Marx answered many of the questions: "I don't remember," although the

events alleged in Ms. Stephenson's complaint had occurred only six days before:

February 15, 1993

Mr. Jerry Marx
Dairy/Frozen Foods Manager

Dear Jerry:

I am writing this letter to you so that there will be no misunderstanding between us. The purpose of this correspondence is to make an investigation into a complaint that has been brought to our attention by Schnuck's associate Tracy Stephenson. Ms. Stephenson reports that you approached her concerning the Company's survey results during her working hours while she was making new tags for certain Company products. This associate also reports that she stays late in the evening in order to avoid discussing this same matter with you. In order to complete our investigation, please provide responses to the following questions:

1. On February 9, 1993, at about 9:30 a.m., did you interrupt Ms. Stephenson while she was working to ask her about her discussion of the Company's wage and hour survey with two management representatives?

"Don't remember"

2. Were you working when you approached Ms. Stephenson?

"N/A"

3. Did you tell her essentially that if she believed the Company had discriminated

against her, then she could hire a lawyer to sue it for a lot of money as you had done?

"N/A"

4. Did Ms. Stephenson reply that she was not money hungry?

"N/A"

5. Did you then respond: "Well, I am?"

"N/A"

6. How many times have you interrupted Ms. Stephenson during her working time to ask her about the Company's wage and hour survey to tell her about the lawsuit, or to comment about either the survey or your suit, or both?

"Don't remember interrupting her while working"

7. Have you interrupted the work of any other associates besides Ms. Stephenson to ask questions about the wage and hour survey, to tell them about your lawsuit, or to comment about either the survey or your suit, or both? (If so, provide the names and the number of employees you approached during working hours.)

"N/A"

8. If you deny Ms. Stephenson's report, please explain what you believe caused her to make false accusations against you?

"Don't know"

In closing, the Company reminds you of your position as the Company's Dairy/Frozen Foods Manager and emphasizes your responsibility to avoid any type of retaliation against

> Ms. Stephenson. Upon reviewing your written responses, we will inform you of the results of this investigation.
>
> Sincerely,
>
> Mr. Phil Lunn
> Store Manager

Appendix D.

On February 19, 1993, Schnucks demoted Marx from his manager's position to that of a clerk at another store, but did not reduce his pay. (Aplee. Supp. App. 92-93) Schnucks informed him by written notice that he was being demoted, because the Company believed he had failed to tell the truth during its investigation of Ms. Stephenson's complaints:

> Frankly, after completing the investigation, we believe in our opinion that you failed to tell the truth in your written response. It is simply incomprehensible for us to believe that you were unable to recall anything about a conversation that occurred six (6) days ago.
>
> . . .
>
> In short, we expect our managers to be truthful, and you have not been truthful in connection with the Company investigation.

Appendix E.

On September 14, 1993, Marx filed a lawsuit concerning his demotion contending that he was demoted because of his age. Thereafter this complaint was amended November 30, 1993 to include a FLSA retaliation claim. During the discovery phase of this lawsuit, Schnucks learned of several incidents of dishonesty and

misconduct engaged in by Marx in connection with his employment. Consequently, on June 27, 1994, Schnucks terminated Marx. In its letter informing Marx of his termination, Schnucks told him that it based its decision to discharge him both on the numerous misrepresentations and omissions in his employment documents and on the conspiracy which he and his wife perpetrated in order to defraud and deceive management and his co-workers. The June 27, 1994 letter summarizing Schnucks' reasons for discharging Marx stated as follows:

1. That you falsified your employment application (i.e., listing an incorrect home address and phone number, and omitting that your wife was employed by Schnucks);

2. That you falsified Schnucks' New Hire Form (i.e., incorrectly listing your marital status as "divorced," listing an incorrect residence address, and omitting your spouse's name and birthday);

3. That you falsified your Federal IRS/Form W-4 (i.e., incorrectly representing that you were "single" when in fact you were married, and again listing an incorrect residence address);

4. That at your November 30, 1993, and June 2, 1994, depositions, you misrepresented that you were unaware that a wedding shower was being held in your and your wife's honor;

5. That you denied in your answers on March 23, 1994 to the Company questionnaire, that the bachelor party was also held in your honor;

6. That at your June 2, 1994 deposition, you misrepresented that you were unaware that a bachelor party was held jointly in your and Dan Woodland's honor; and

7. That at your June 2, 1994 deposition you admitted that you falsified and or deliberately omitted pertinent information to help you obtain employment with our Company.

8. That you deliberately gave untrue statements, misleading answers and concealed facts in your employment application in order to secure employment with our Company. It is our Company policy to terminate any associate who we conclude deliberately falsifies the employment application. This policy is printed as part of the Associate Agreement section of our employment application that you, and all applicants are to read and sign as part of the employment process. (A copy of the employment application you signed is attached.)

Specifically, the Associate Agreement states in part:

> In consideration of my employment and in consideration of the salary, commissions or wages to be paid to me during the continuance of such employment, I agree as follows:
>
> * * *
>
> (h) I warrant the foregoing to be a truthful and complete statement of facts. Furthermore, any untrue or misleading answer or concealment of any fact will constitute sufficient cause for my immediate discharge.

As previously noted, you listed an incorrect home address and phone number, and omitted listing that your wife was employed by Schnucks. In concluding that this was a deliberate misrepresentation by you, our Company has also considered the other Company documents and the Federal IRS form that you falsified. When your incorrect employment documents are viewed in context with your Food Barn application correctly completed ten (10) days earlier, wherein you listed your correct address and marital status, as well as your June 2, 1994, deposition, it is apparent that you falsified and or deliberately omitted pertinent information to help you obtain employment with our Company.[2]

9. That you and your wife both engaged in a conspiracy to gain employment with our Company, embarked upon a deliberate course of conduct from the outset of your employment to defraud your co-workers and members of management as to your marital status (i.e., pretending to be a "friend" of Terri Lynn Green when first employed, pretending to be "dating" Terri Lynn Green the first eight to ten months employed, pretending to move and begin "living together" with Terri Lynn Green as your "fiancee" in the later part of 1991, to cause your personnel records to be changed in 1991 to reflect your "new" emergency

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[2] It should be noted the Tenth Circuit's holding in this case mandates a jury trial notwithstanding that the employer has established that an employee has reportedly lied to obtain employment, and thereafter lied at his own deposition.

> contact to be "Terri Lynn Green – relationship – Fiancee" with the same address and phone number as yours, permitting Schnucks' management and your co-workers to throw a bridal shower for you, accepting shower and wedding presents (a Waterford crystal vase, dinner tickets for the New Theatre, candle sticks, etc.), permitting your co-workers to honor you and another employee at a bachelor party (including the cost of a limousine and the payment for a "lap dance") when, unbeknownst to Schnucks' management and your co-workers, you had already been married for two years).

Appendix F.

Presented with these facts, the District Court granted summary judgment in favor of Schnucks. The Tenth Circuit, however, reversed the District Court's decision.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion effectively precludes summary judgment and requires a trial in *all* retaliation cases where an adverse employment action closely follows protected activity. This Court should grant the writ, since the Tenth Circuit holding mandates that every FLSA employment retaliation claim must be presented to the jury regardless of a company's valid reasons for disciplining an employee. Unless writ is granted, the Tenth Circuit's holding will preclude summary judgment in each case where there has been a wage and hour complaint followed in time by any adverse action, regardless of the

employer's legitimate, non-retaliatory business reasons for its actions and regardless of the plaintiff's failure to introduce evidence to rebut the employer's legitimate, non-retaliatory business reasons. This result is clearly contrary to the holdings of three other federal circuit courts of appeal as well as prior Tenth Circuit precedent. The Tenth Circuit holding dictates that even if an employee is discharged for shooting and killing the president of his company, the company will not be entitled to summary judgment on the employee's discharge lawsuit if his discharge closely followed a complaint concerning the company's wage and hour practices. This Court should grant the writ and prevent the compulsory trial of cases which clearly merit summary disposal.

1. The Tenth Circuit's view is erroneous, because the same evidentiary scheme should apply to cases of retaliation for FLSA activity as applies to all other cases of retaliation for an employee's activity under other protective statutes.

In analyzing Marx's FLSA retaliation claim, the Tenth Circuit did not apply the evidentiary scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[3]

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[3] Although the Tenth Circuit has not had occasion to address the applicability of *McDonnell Douglas* to FLSA retaliation claims, prior Tenth Circuit FLSA retaliation decisions are not inconsistent with the use of *McDonnell Douglas*. The Tenth Circuit, moreover, commonly applies *McDonnell Douglas* to other retaliation claims. *See, e.g., Phelps v. Field Real Estate Co.*, 991 F.2d 645, 649 (10th Cir. 1993) (ERISA retaliation claim); *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339 (10th Cir. 1982) (Title VII retaliation), *cert. denied*, 459 U.S. 1071 (1982).

Rather, it began its analysis of Marx's FLSA claim by stating that the Tenth Circuit applies a "motivating factor test" to FLSA retaliation claims. Then, in applying the "motivating factor" test to this claim, the Court held that the Plaintiff's allegation that a pattern of retaliatory action "closely followed" his protected activity created an inference of discrimination. The Court then concluded its analysis by holding that such an inference created a genuine issue of material fact as to Schnucks' motivation for the adverse employment action. Simply stated, the Court held that because of the temporal proximity between the adverse action and the protected activity alone, there was a genuine issue of material fact as to the motivating factor of Schnucks' demotion and discharge of Marx. The Court failed to address whether the Plaintiff established a prima facie case of retaliation, failed to address Schnucks' non-retaliatory reasons for its actions and failed to address whether the Plaintiff put forth sufficient evidence to create a genuine issue of material fact as to whether Schnucks' stated reasons were a pretext for illegal retaliation.

The Court correctly stated that a plaintiff must show that protected activity was the "motivating factor" of an adverse employment action in order to prevail on a FLSA retaliation claim. *See Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir. 1984). The same showing is required of a Title VII retaliation plaintiff. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989). In both Title VII and FLSA retaliation claims, the ultimate question is the same – whether an illegal reason was the "motivating factor" of the adverse employment action.

In a case such as this, where there is no direct evidence of an illegal motive, the analysis of whether there is a genuine issue of fact as to whether an illegal reason was a "motivating factor" in an adverse employment action requires a showing by the plaintiff of a prima facie case, the articulation by the employer of a legitimate reason for its actions, and a showing by the plaintiff that the employer's stated reasons are pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In a retaliation case, a plaintiff's prima facie case consists of the following factors:

1) participation in activity protected by FLSA;

2) adverse action by the employer subsequent to or contemporaneously with the activity; and

3) a causal connection between the activity and the adverse action.

Burrus v. United Telephone Company of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982). In response to the prima facie case, an employer must articulate a legitimate, non-retaliatory reason for the adverse action. *Id.* In order to avoid summary judgment, if the employer produces evidence of a legitimate reason, the burden shifts to the plaintiff to submit evidence which shows that the employer's stated reason is a pretext for retaliation.

As to the Plaintiff's prima facie case, the Court should have required Marx to establish that he engaged in protected activity, that Schnucks took an adverse employment action against him, and that there was a causal connection between the two. If the Court would have analyzed whether the Plaintiff established a prima

facie case, it would have likely held that Marx did establish a prima facie case. Although Schnucks disputes that Marx can establish the third element of a prima facie case, i.e., the requisite causal link, the District Court found, and the Tenth Circuit would have agreed, that temporal proximity between the protected activity and the adverse action served to establish the causal link element of a prima facie case.[4] *See Love*, 738 F.2d at 386. The Court, however, concluded its analysis at this point. The Court never addressed Schnucks' non-retaliatory reason for its demotion of Marx – his untruthfulness during a Company investigation. Nor did the Court address Schnucks' non-retaliatory reason for its discharge of Marx – his many misrepresentations on employment documents and the fraudulent scheme played by him on his co-workers and members of management, including lying about these misrepresentations at his June 2, 1994 deposition. In its application of the *McDonnell Douglas* test to Marx's FLSA retaliation claim, the District Court succinctly summarized Schnucks' reason for its demotion and discharge of Marx as follows:

> Although he may feel that his demotion and termination were unjustified, as this court has previously observed, "[t]he decision to terminate an employee who is considered to be

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[4] Schnucks disputes that a demotion three months, and a discharge nineteen months after Marx's having engaged in protected activity in November, 1992, is the close temporal proximity contemplated by Tenth Circuit law. *See Candelaria v. EG&G Measurements, Inc.*, 33 F.3d 1259 (10th Cir. 1994). The Tenth Circuit in *Simmons, infra*, granted summary judgment to an employer where the employee was discharged only two weeks after engaging in protected activity.

> untrustworthy is the prerogative of the employer, and it is not the court's province to second guess such decisions once it is established that a prohibited motive was not involved." (citations omitted).

Marx v. Schnuck Markets, Inc., 863 F.Supp. 1489, 1497 (D. Kan. 1994) (Appendix A). The Tenth Circuit did discuss Schnucks' stated reasons for its discharge and demotion of Marx in connection with his ADEA claim and found that Schnucks presented facially nondiscriminatory reasons – Plaintiff's lies and misrepresentations for his demotion and discharge. Accordingly, it can be assumed that had the Court addressed these reasons in connection with the FLSA claim, it would have again affirmed the legitimacy of Schnucks' reasons for its discharge and demotion of Marx. The Court then should have addressed whether Schnucks' stated reasons were a pretext for illegal retaliation. Essentially, the Court required the Plaintiff to do nothing more than establish a prima facie case to defeat Defendant's motion for summary judgment. Such a result is contrary to the opinion of the United States Supreme Court in *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993). If a defendant submits a legitimate reason for an adverse employment action, the presumption of illegal action created by the prima facie case is rebutted and drops from the case. *Id.* at 2747. Accordingly, although the Court held that proximity in time created a presumption of discrimination, this presumption should have dropped from the Court's consideration when Schnucks articulated legitimate reasons for its actions.

Had the Court engaged in an appropriate analysis of the Plaintiff's retaliation claim, it would have, at the pretext stage of the analysis, been compelled to uphold the District Court's grant of summary judgment in favor of the Defendant; because the Plaintiff simply did not produce sufficient evidence to create a genuine issue of material fact as to whether Defendant's stated reasons were a pretext for retaliation. The District Court, in its application of the *McDonnell Douglas* test to Marx's FLSA retaliation claim, noted as follows with respect to Marx's failure to produce sufficient evidence to create a genuine issue of fact for trial:

> As to Plaintiff's evidence of his performance prior to his demotion, this evidence is relevant as to whether Plaintiff produced evidence sufficient to show a prima facie case of discrimination. However, that evidence does not satisfy Plaintiff's burden to come forward with evidence showing that Defendant's proffered reasons for demoting him were pretexual. This evidence does not do anything to remedy Plaintiff's failure to come forward with evidence creating a question of fact as to whether defendants proffered reasons for its actions were pretextual.

Marx v. Schnuck Markets, Inc., 869 F.Supp. 895, 898 (D. Kan. 1994) (Appendix B). The Tenth Circuit points to no evidence of pretext in the record other than the closeness in time between the protected activity and the adverse employment action. While temporal proximity alone may be enough to establish an *inference* of retaliation at the prima facie stage of analysis, it is not enough, without

more, to establish that an employer's legitimate, non-retaliatory business reason is a pretext for illegal retaliation.

2. The Tenth Circuit's decision is in direct conflict with the holdings of three other circuits as to the quantum of proof needed to defeat summary judgment in a retaliation case.

The Fourth, Seventh, and Eighth Circuits agree with the proposition that while timing alone may aid a plaintiff in establishing a prima facie case of retaliation, it cannot by itself make a showing of pretext sufficient to withstand summary judgment. *See, e.g., Hughes v. Bedsole*, 48 F.3d 1376 (4th Cir. 1995); *Johnson v. Univ. of Wisconsin-Eau Claire*, 69 Fair Empl. Prac. Cas. (BNA) 6441 (7th Cir. 1995) (reprinted in Appendix G); *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548 (8th Cir. 1993); *Rath v. Selection Research, Inc.*, 978 F.2d 1087 (8th Cir. 1992).

In *Hughes*, the Fourth Circuit upheld the district court's grant of summary judgment in favor of the defendant, where the only evidence of retaliatory motivation was the fact that the plaintiff was discharged two weeks after having engaged in protected activity. The Court commented that "temporal proximity is simply too slender a reed on which to rest a . . . retaliatory discharge claim." *Hughes*, 48 F.3d at 1387. Similarly, in *Johnson*, the Seventh Circuit held that although temporal proximity alone may be enough to establish the causal link necessary for a prima facie case of retaliation, it is insufficient, without more, to raise a genuine issue of fact as to pretext. The Eighth Circuit in *Schweiss* and *Rath* agrees with

the decisions in the Fourth and Seventh Circuits when it holds that the causal connection necessary to establish a prima facie case of retaliation can be shown by temporal proximity, however, "it is insufficient, as a matter of law to create a genuine issue of material fact on the question of motive." *Schweiss*, 987 F.2d at 550. The District Court's decision is consistent with the decisions of the Fourth, Seventh and Eighth Circuits. The District Court specifically held that "because of the inability of the plaintiff to bring forward evidence of a prohibited motive beyond the mere proximity in time which supported his prima facie case, the court finds that defendant is entitled to summary judgment on plaintiff's retaliation claims." *Marx*, 863 F.Supp. 1489, 1497 (D. Kan. 1994) (Appendix A).

3. The question presented is important, because if a writ is not issued, then every employer will be precluded from obtaining summary judgment even though it has articulated a legitimate, non-retaliatory business reason for its actions, and the plaintiff has not rebutted the employer's legitimate, non-retaliatory business reasons.

The Supreme Court's writ to the Tenth Circuit is necessary to correct the effect of the Tenth Circuit's decision. The Tenth Circuit has decided that no employer may obtain summary judgment even though it has articulated a legitimate business reason for an adverse action and even though a plaintiff has failed to present sufficient evidence to rebut the employer's reason. The Tenth Circuit's decision flies in the face of this Court's decision in *St. Mary's Honor Center v. Hicks, supra*. Marx attempted to

argue before the District Court that he had produced sufficient evidence to defeat Schnucks' motion for summary judgment under the *Hicks* decision, because this Court in *Hicks* stated that a fact finder's disbelief of an employer's stated reason "may together with the elements of a prima facie case, suffice to show intentional discrimination." *Hicks*, 113 S.Ct. at 2749. The District court rejected this argument as follows:

> The court does not find merit in plaintiff's argument. Under plaintiff's argument, any plaintiff who was able to establish a prima facie case of discrimination would automatically survive summary judgment. The court does not believe this to be the law, nor a proper reading of *St. Mary's*. The court in *St. Mary's* was dealing with the issue of whether, at the trial stage, a plaintiff's disproving of an employer's proffered reasons for its actions was sufficient to entitle a plaintiff to judgment as a matter of law. The court held that it was not sufficient and that plaintiff still had the burden of proving that the employer had unlawfully discriminated. The court does not believe that the decision in *St. Mary's*, which dealt with the effect of an employer's stated reasons for taking an employment action being discredited at the trial stage, affects plaintiff's burden, at the summary judgment level, to produce specific facts, beyond mere conjecture, that an employer's explanation

> of its employment action is a pretext for intentional discrimination. *See Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir. 1988).

Marx, 869 F.Supp. at 898.

The post *Hicks* decisions illustrate the higher quantum of proof required at the pretext stage of analysis, as compared to the low level of proof required to establish a prima facie case. For example, the Ninth Circuit in *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994), succinctly states the difference in these two stages of proof as follows:

> . . . in deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the prima facie case, as well as the other evidence offered by the Plaintiff to rebut the employer's offered reasons. And, in those cases where the prima facie case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, Plaintiff has failed to raise a triable issue of fact.

Id. at 890. A writ is necessary to clarify that this Court did not intend *Hicks* to be interpreted to allow plaintiffs to avoid summary judgment merely by establishing a prima facie case.

4. The Tenth Circuit's holding conflicts with a decision previously issued by the Tenth Circuit.

In *Simmons v. Security Benefit Group, Inc.*, 968 F.2d 1224 (10th Cir. 1992) (unpublished opinion reprinted in Appendix H), the Tenth Circuit held that in order to

establish a prima facie case of retaliation, a plaintiff must show: 1) protected activity, 2) adverse employment action, and 3) a causal connection. The court further held that proximity in time between the protected activity and the adverse employment action establishes the causal connection required for a prima facie case. The court states, in addressing a retaliation complaint where the plaintiff was discharged only two weeks after having engaged in protected activity, however, that closeness in time alone is not sufficient to establish a genuine issue of material fact as to whether an employer's stated reason for discharge is a pretext. The Tenth Circuit in *Simmons* states on page 5:

> . . . the only significant evidence Appellant relies on to support her claim of retaliation is the close temporal relationship between Appellant's filing of this lawsuit and her termination. After examining the extensive record of the events over the years we find that the date of Appellant's discharge and its close proximity to her filing of this lawsuit are completely fortuitous. Appellant has not come forth with sufficient evidence to show that Appellee's stated reasons for her termination were a pretext for discrimination. Thus, we must hold that Appellant has not presented sufficient evidence to create a genuine issue of material fact as to whether [Appellee's] stated reasons for termination were pretextual.

See also Meredith v. Beech Aircraft, 18 F.3d 890 (10th Cir. 1994). In *Meredith*, the Tenth Circuit held that the plaintiff could not establish a prima facie case nor could she provide sufficient evidence of pretext where she merely submitted evidence, like Marx, that she was discharged

during the discovery phase of her lawsuit against her employer. In *Meredith*, the Tenth Circuit also required additional evidence as to the Defendant's alleged retaliatory motives:

> Ms. Meredith has also failed to show retaliation because she failed to show a causal connection between her termination and the lawsuit she initiated against Beech. The mere filing of a complaint against Beech is insufficient evidence to defeat a summary judgment motion to dismiss the retaliation claim.

Id. at 897. Thus, the decision below by the Tenth Circuit conflicts with other earlier decisions in that same circuit, as well as decisions by three other circuits on the same issue.

CONCLUSION

The Supreme Court's writ to the Tenth Circuit is necessary to resolve two issues of exceptional importance. One, does the analytical framework of *McDonnell Douglas*, as affirmed in *St. Mary's Honor Center v. Hicks*, apply to FLSA retaliation claims; and two, is proximity in time alone sufficient to defeat a motion for summary judgment on a retaliation claim. Schnucks believes that the shifting burden described by the Supreme Court in *McDonnell Douglas* is the only appropriate method of determining whether an impermissible factor motivates a defendant's actions where, as here, there is no direct evidence of retaliation. As to proximity in time, the Tenth

Circuit's decision effectively precludes summary judgment in *all* retaliation cases where an adverse employment action closely follows protected activity. This result is clearly contrary to decisions in the Fourth, Seventh, and Eighth Circuits and contrary to Tenth Circuit precedent, since the Tenth Circuit upheld a grant of summary judgment in favor of the defendant in *Simmons, supra*, even in light of the Court's finding that the plaintiff's discharge closely followed her participation in protected activity. Accordingly, the writ is necessary to resolve these issues.

Respectfully submitted,

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APPENDIX A

Gerald MARX, Plaintiff,

v.

SCHNUCK MARKETS, INC., Defendant.

No. 93-2375-JWL.

United States District Court,
D. Kansas.

Sept. 30, 1994.

Grocery store employee who had been demoted and then terminated brought action against store alleging discrimination in violation of Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA). Store moved for summary judgment, and the District Court, Lungstrum, J., held that: (1) employee had failed to produce evidence establishing pretext or direct evidence of discrimination in violation of ADEA, and (2) employee had failed to produce any evidence beyond prima facie case that immediate cause or motivating factor of store's adverse employment action was his assertion of statutory rights under FLSA.

Motion granted.

Stephen J. Dennis, Kenneth R. Battis, Dennis & Battis, P.A., Fairway, KS, for plaintiff.

Nancy M. Landis, Spencer, Fane, Britt & Browne, Overland Park, KS, Dennis G. Collins, Lisa K. Boyer, Greensfelder, Hemker & Gale, P.C., St. Louis, MO, for defendant.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

I. Introduction

This case involves claims by plaintiff Gerald Marx against defendant Schnuck Markets, Inc. ("Schnucks") for age discrimination, retaliation for participation in activities protected by the Fair Labor Standards Act ("FLSA"), and breach of contract and FLSA violations for failure to pay overtime compensation. The matter is currently before the court on defendant's motion for summary judgment (Doc. # 56).

In its motion, defendant seeks summary judgment on plaintiff's claims for discriminatory demotion and discharge under the Age Discrimination in Employment Act ("ADEA"), and plaintiff's claims for retaliatory demotion and discharge for engaging in activity protected under the FLSA, in violation of 29 U.S.C. 215(a)(3). For the reasons set forth below, defendant's motion is granted.

II. Factual Background

Plaintiff's wife, Terri Lynn Marx, completed an application for employment at Schnucks on February 20, 1991, and her first day of work was February 25, 1991. At the time she completed her employment application, she listed her name as Terri Lynn Green, and her address as 9126 Lowell.

Plaintiff was hired by Schnucks on March 2, 1991 as a dairy/frozen food clerk at the rate of $5.00 per hour.[1] Plaintiff was fifty-one (51) years of age when he was hired. On August 17, 1992, Schnucks promoted plaintiff to the position of dairy/frozen manager with a pay rate of $9.50 per hour. Plaintiff was fifty-two (52) years of age at the time of this promotion.

On October 4, 1992, Terri Lynn Marx reported to Schnucks that she believed the company was failing to pay overtime in accordance with Federal law. After Schnucks completed an internal investigation of its wage and hour practices, Schnucks concluded there were some violations and elected to report the matter to the United States Department of Labor. Schnucks prepared an employee survey for the purpose of allowing employees to collect unpaid overtime, which was approved by the United States Department of Labor, and mailings were made to all employees on December 9, 1992. A second mailing was done to non-responding employees on January 4, 1993. Eventually, Schnucks distributed a total of $50,377.33 to 117 current and former employees.

On October 14, 1992, Terri Lynn Marx was terminated from her employment at Schnucks. Defendant claims that her termination was the culmination of an investigation that began in August, 1992, due to several bizarre comments made by Ms. Marx. Following the investigation,

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[1] As discussed later, at the time he was hired, Schnucks was unaware that plaintiff and Terri Lynn Marx were married.

Schnucks terminated her employment for allegedly falsifying her original employment application, including her use of a social security number that was not her own.

On November 24, 1992, plaintiff and his wife filed a class action suit against Schnucks in the District Court of Johnson County, Kansas, alleging wage and hour violations against Schnucks. In addition, Ms. Marx claimed that she was retaliated against by her discharge for bringing the wage and hour concerns to Schnucks' attention.[2]

On February 12, 1993, Traci Stephenson, an employee at the Schnucks store where plaintiff was a manager, filed a complaint with store management regarding an alleged encounter she had with plaintiff. In her complaint, Ms. Stephenson described an encounter she had with plaintiff at work regarding the wage and hour survey, wherein plaintiff made her feel uncomfortable, and related that plaintiff's conduct was affecting her work performance. On February 15, 1993, Schnucks presented plaintiff with a questionnaire concerning Ms. Stephenson's allegations. In response to the questionnaire, plaintiff indicated that he did not remember the encounter.

On February 19, 1993, Schnucks demoted plaintiff from his manager's position to that of a clerk at another store. In its demotion notice, Schnucks indicated its belief that plaintiff had not been truthful in connection with the investigation into Ms. Stephenson's complaint. Plaintiff continued to receive his same salary of $9.50 per hour.

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[2] Eventually, both the class action suit and Ms. Marx' individual claims were voluntarily dismissed.

On September 14, 1993, plaintiff filed his complaint in this court alleging that Schnucks had demoted him because of his age in violation of the ADEA. Subsequently, plaintiff amended his complaint to include a claim that Schnucks had demoted him in retaliation for plaintiff's and plaintiff's wife's complaints and involvement in the suit regarding the overtime wages.

During discovery in connection with this lawsuit, Schnucks discovered several misrepresentations with regard to plaintiff's employment application. Chief among these were plaintiff's apparent misrepresentations regarding the fact that he was married to Terri Lynn Marx.[3] Plaintiff left blank the box on his employment application indicated for "relatives employed by Schnuck Markets" even though he was married to Terri Lynn Marx at the time he made application. Plaintiff also indicated his marital status as divorced on his new hire form, completed in conjunction with his application, even though he was married to Terri Lynn Marx at the time. Additionally, plaintiff indicated on his Federal IRS Form W-4 that his marital status was single. Plaintiff also was living with his wife at 9126 Lowell at the time he applied for employment, yet listed a different address, where he had never resided, on his employment application.[4]

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[3] William Jones, a Schnucks manager, testified in his deposition that Schnucks had a policy that prohibited married persons from working in the same store. However, defendant has produced no evidence that this was a written policy.

[4] Apparently, plaintiff's deceptions regarding his marital status did not end with his employment application. Schnucks presents evidence regarding a wedding shower that was held in honor of plaintiff and his wife in the spring of 1992, at which

When questioned about the apparent misrepresentations on his application at several depositions in this case, plaintiff gave several different explanations. At one deposition, when questioned as to why he had left the box blank regarding "relatives employed by Schnuck Markets," he replied that he didn't know at the time whether his wife was employed by Schnuck Markets. However, in that same deposition, he stated that his wife was working at Schnucks' Shawnee store when he applied for employment. As to the question regarding his residence address, plaintiff at one point testified that he had no residence at the time of his application, yet later admitted he was living at 9126 Lowell at the time he applied. Additionally, plaintiff first contended that he did not intentionally misrepresent his marital status on his employment application and other documents, and that he had not spoken with anyone regarding how to complete the answers on the application form, yet later contended he had failed to acknowledge that he was married on the forms because his wife had told him that Dan Kunz, a Schnucks manager, had told his wife that "it would be best that we were not married to keep everyone from getting into trouble."

Schnucks employees purchased gifts for the couple, and evidence that plaintiff was honored at a bachelor party thrown for Mr. Marx and another employee during that same time period. Plaintiff denies that he was aware the party held at the store was a wedding shower. However, defendant has produced affidavits from numerous employees who attended the party stating that the party included decorations, cake and the presentation of wedding gifts. The employees uniformly state that plaintiff knew the party was a wedding shower.

On June 27, 1994, one day before the pretrial conference was originally held in this matter, Schnucks terminated plaintiff. Among the reasons given by Schnucks in plaintiff's termination letter were: (1) that plaintiff falsified his employment application, new hire form and Federal IRS/Form W-4; (2) that at various depositions plaintiff falsely denied that a wedding shower and bachelor party were held in his honor; (3) that he admitted at his June 12, 1993 deposition that he had falsified and/or deliberately omitted pertinent information to help him obtain employment with the company; (4) that, consistent with company policy, any person who is found to have deliberately falsified their employment application is terminated;[5] and (5) that plaintiff and his wife both engaged in a conspiracy to gain employment with the Company and embarked on a deliberate course of conduct from the outset of his employment to defraud his co-workers and members of management as to his marital status.

III. Summary Judgment Standards

A motion for summary judgment gives a judge an initial opportunity to assess the need for a trial without

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[5] The associate agreement signed by plaintiff provides in part:

> In consideration of my employment and in consideration of the salary, commissions or wages to be paid to me during the continuance of such employment, I agree as follows: (h) I warrant the forgoing to be a truthful and complete statement of facts. Furthermore, any untrue or misleading answer or concealment of any fact will constitute sufficient cause for my immediate discharge.

weighing the evidence or determining credibility. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. at 2512.

The party who files a motion for summary judgment has the initial burden of demonstrating the absence of a genuine issue of material facts concerning its claims. This burden may be met by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514. The nonmoving party may not simply rest on its pleadings in the case but has the affirmative duty to come forward with facts to establish that a genuine issue exists necessitating a trial in the case. *Id.* Thus, the mere existence of some alleged factual dispute between the parties will not defeat an

otherwise properly supported motion for summary judgment. *Id.* The court must consider the record in the light most favorable to the party opposing the motion. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir.1984), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1187, 84 L.Ed.2d 334 (1985). More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed.R.Civ.P. 1." *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2555.

IV. Discussion

A. Plaintiff's ADEA Claims

The Age Discrimination in Employment Act is remedial and humanitarian legislation that is to be liberally construed for the purpose of ending age discrimination in employment. *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir.1976), aff'd, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977). The Act prohibits an employer from discriminating against an employee with respect to his or her compensation, terms, conditions, or privileges of employment based on the individual's age. 29 U.S.C. § 623(a)(1). Under ADEA, a plaintiff is required to prove that age was the determining factor in the decision adversely affecting him. *E.E.O.C. v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir.1988); *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 656 (10th Cir.1984). He or she need not prove that age was the sole reason for the adverse treatment, but must show that it "made the difference" in the employer's decision. *Sperry Corp.*, 852 F.2d at 507; *E.E.O.C. v. Prudential Federal*

Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir.), *cert. denied*, 474 U.S. 946, 106 S.Ct. 312, 88 L.Ed.2d 289 (1985).

The Tenth Circuit has adopted the burden-shifting analysis outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) for discrimination claims and has adapted it to claims under ADEA. *See Branson v. Price River Coal Co.*, 853 F.2d 768, 770 (10th Cir.1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir.1988). A plaintiff must present a prima facie case of employment discrimination by showing that he or she: (1) is within the protected age group; (2) was doing satisfactory work; (3) was discharged despite the adequacy of this work; and (4) was replaced by a younger person. *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir.1986). Once a plaintiff establishes a prima facie case, the defendant has the burden to articulate a legitimate, nondiscriminatory reason for the treatment of the plaintiff. *Cockrell*, 781 F.2d at 177. The burden of persuasion then remains with the plaintiff to demonstrate that the defendant's explanation is a mere pretext for unlawful discrimination. *Id.* A plaintiff may produce evidence that would satisfy this burden by showing directly that age discrimination more likely motivated the defendant, or by showing that the defendant's explanation is not worthy of belief. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 798 (10th Cir.1993).

The court finds that plaintiff has satisfied the prima facie case requirements for his age discrimination claims for both wrongful demotion and wrongful discharge. Plaintiff was within the protected age group at the time of both actions, and has presented evidence through work reviews that his performance was adequate. Plaintiff has

also produced evidence that his replacement following his demotion from dairy/frozen food manager was younger than he was.

The court further finds that defendant has articulated legitimate, nondiscriminatory reasons for both its demotion of plaintiff and its later termination of plaintiff. Defendant has presented evidence that the reason for plaintiff's demotion was defendant's belief that plaintiff was not truthful in connection with an investigation undertaken by defendant following its receipt of a complaint from an employee at the Schnucks store where plaintiff was manager regarding an alleged encounter she had with plaintiff. As to plaintiff's termination, defendant has presented evidence that it terminated plaintiff due to the fact that plaintiff misrepresented his marital status on his employment application for the purpose of gaining employment at Schnucks, that plaintiff continued to misrepresent his marital status following his employment, and that defendant therefore terminated him consistent with its policy of terminating persons found to have deliberately falsified their employment applications.

Given defendant's articulation of a legitimate, nondiscriminatory reason for plaintiff's treatment, the burden thus falls on plaintiff to produce evidence that age discrimination more likely motivated plaintiff, or to show that defendant's articulated reasons for demoting and later terminating him are merely pretextual and not worthy of belief. The ultimate burden of persuasion remains with the plaintiff. "In ADEA cases, no matter whether tried or submitted on summary judgment motion, it is obvious that the ultimate question is whether age was a

determining factor in the employer's decision." *See MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1122 (10th Cir.1991). The Tenth Circuit has described the plaintiff's burden on summary judgment as follows:

> To avoid summary judgment, a party must produce "*specific* facts showing that there remains a genuine issue for trial. . . . " Thus, plaintiffs' mere conjecture that their employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.

Branson v. Price River Coal Co., 853 F.2d 768, 771-72 (10th Cir.1988) (citations omitted).

The court finds that plaintiff has produced no evidence that age was a determining factor in defendant's decisions. Plaintiff's opposition brief is devoid of any factual record that would establish pretext or direct evidence of discrimination. As to the ultimate question of whether age was a determining factor in defendant's decisions to discharge and terminate, plaintiff has simply produced no evidence beyond his showing of a prima facie case. Accordingly, the court finds that defendant is entitled to summary judgment on plaintiff's age discrimination claims for wrongful demotion and wrongful termination.

B. Plaintiff's FLSA claims

Defendant also seeks summary judgment on plaintiff's retaliatory demotion and retaliatory discharge

claims brought under section 15(a)(3) of the FLSA. Section 15(a)(3) provides that it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . , or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3).

When the immediate cause or motivating factor of an adverse employment action is the employees' assertion of statutory rights, the adverse action is discriminatory under § 215(a)(3). *See Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir.1992); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 387 (10th Cir.1984). If retaliation is not the motivating factor, then the adverse action is not unlawful. Martin, 977 F.2d at 1408.

In analyzing FLSA retaliation claims at the summary judgment stage, courts commonly apply the shifting burden analysis described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876 (2nd Cir.1988); *Brock v. Richardson*, 812 F.2d 121 (3rd Cir.1987); *Strickland v. Mica Information Systems*, 800 F.Supp. 1320 (M.D.N.C.1992). The Tenth Circuit has not had occasion to address whether the McDonnell Douglas analysis applies to retaliatory actions under section 215(a)(3). However, the Tenth Circuit commonly applies the McDonnell Douglas analysis to other retaliation claims,[6]

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[6] *See Burrus v. United Telephone of Kansas, Inc.*, 683 F.2d 339 (10th Cir.1982).

and we believe it would also do so under section 215(a)(3).

The elements of a prima facie case of retaliation are: (1) participation in an FLSA proceeding; (2) adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's action. *Burrus*, 683 F.2d at 343. The Tenth Circuit has described the shifting burdens as follows:

> If a prima facie case is established, then the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. The defendant need not prove the "absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason." If evidence of a legitimate reason is produced, the plaintiff may still prevail if [he] demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff.

Burrus, 683 F.2d at 343 (citations omitted).

The court finds that plaintiff has established a prima facie case of retaliation on both his discharge and termination claims. As to the first two elements of a prima facie case, plaintiff has produced evidence that he was a named plaintiff, along with his wife, in an FLSA action for unpaid overtime against defendant, and that both his demotion and discharge occurred subsequent to the filing of the suit. As to the causal connection, the Tenth Circuit has held that the causal connection may be demonstrated

by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *See Love*, 738 F.2d at 386. Plaintiff's demotion occurred approximately three months after the filing of his FLSA action, and his discharge occurred during the pending litigation. The court finds these facts sufficient to justify an inference of retaliatory motive for the purpose of establishing a prima facie case.

In response, defendant has articulated the same legitimate, nondiscriminatory reasons for both its demotion of plaintiff and its later termination of plaintiff discussed above in connection with plaintiff's ADEA claims. Specifically, as to plaintiff's demotion, defendant has presented evidence regarding its belief that plaintiff was not truthful in connection with an investigation undertaken by defendant following its receipt of a complaint from an employee at the Schnucks store where plaintiff was manager regarding an alleged encounter she had with plaintiff. As to plaintiff's termination, defendant has presented evidence that plaintiff misrepresented his marital status on his employment application for the purpose of gaining employment at Schnucks, that plaintiff continued to misrepresent his marital status following his employment, and that defendant therefore terminated him consistent with its policy of terminating persons found to have deliberately falsified their employment applications.

Plaintiff has put forward several reasons why he believes the defendant's proffered reasons for dismissing him were pretextual, none of which the court believes have any merit. First, plaintiff contends that defendant was not justified in terminating him because he "did not misrepresent his residence address because he had no

residence at the time of his application." However, plaintiff directly contradicts this statement in his November 30, 1993 deposition wherein he admits he lived on Lowell both before and after completing his employment application.

Plaintiff also contends that defendant's proffered reason for terminating him was pretextual because William Jones, a management employee of defendant, admitted in discovery responses that defendant had not disciplined or terminated any employees specifically because of a misrepresentation as to marital status on an employment application. This evidence is less than convincing, however, due to the fact that Mr. Jones additionally stated that he was unaware of any other employee who had made such a misrepresentation. Mr. Jones went on to testify that had defendant known of anyone who had made such a misrepresentation to gain employment, that person would have been terminated. Mr. Jones' testimony is supported by evidence in the record that defendant has terminated eighteen persons since 1988 for falsification of their application of employment.

In short, as with plaintiff's ADEA claims, the court finds that plaintiff has failed to present sufficient evidence to create a question of fact as to whether defendant's proffered reasons for its actions are pretextual. Plaintiff has failed to present any evidence, beyond his prima facie case, that the immediate cause or motivating factor of defendant's adverse employment action was plaintiff's assertion of statutory rights. Although he may feel that his demotion and termination were unjustified, as this court has previously observed, "[t]he decision to

terminate an employee who is considered to be untrustworthy is the prerogative of the employer, and it is not the court's province to second guess such decisions once it is established that a prohibited motive was not involved." *John v. Lujan*, No. 88-2550 (D.Kan. Feb. 26, 1992) (1992 WL 41354); see also *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir.1988) (courts should not second guess an employer's business judgment). Accordingly, because of the inability of plaintiff to bring forward evidence of a prohibited motive beyond the mere proximity in time which supported his prima facie case, the court finds that defendant is entitled to summary judgment on plaintiff's retaliation claims.

V. Conclusion

IT IS, THEREFORE, BY THE COURT ORDERED THAT defendant's motion for summary judgment (Doc. # 56) is granted. Plaintiff's ADEA claims for wrongful demotion and termination and FLSA claims for retaliatory demotion and discharge are dismissed.

IT IS SO ORDERED.

APPENDIX B

Gerald MARX, Plaintiff,

v.

SCHNUCK MARKETS, INC., Defendant.

No. 93-2375-JWL

United States District Court,
D. Kansas.

Nov. 21, 1994.

Grocery store employee who had been demoted and then terminated brought action against store owner alleging discrimination in violation of Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA). Store moved for summary judgment, and motion was granted by the District Court 863 F.Supp. 1489. Employee moved for reconsideration of order, and the District Court, Lungstrum, J., held that: (1) application of *McDonnell Douglas* shifting burden analysis at summary judgment stage of action was proper where employee did not rely on after-acquired evidence in justifying demotion and termination of employee, and (2) evidence that employee's performance prior to demotion was satisfactory did not remedy employee's failure to satisfy burden of coming forward with evidence showing that employer's proffered reasons were pretextual.

Motion denied.

Stephen J. Dennis, Kenneth R. Battis Dennis & Battis, P.A., Fairway, KS, for plaintiff Garald Marx.

Nancy M. Landis, Spencer, Fane, Britt & Browne, Overland Park, KS, Dennis G. Collins, Lisa K. Boyer, Greensfelder, Hemker & Gale, P.C., St. Louis, MO, for defendant Schnuck Markets, Inc.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

I. Introduction

This matter is currently before the court on plaintiff's motion to reconsider the courts order of summary judgment entered September 30, 1994 (Doc. #91). In our order, the court granted defendant summary judgments on plaintiff's claims of discriminatory demotion and discharge under the ADEA and plaintiff's claims of retaliatory demotion and discharge under the FLSA, 863 F.Supp. 1489. Plaintiff seeks reconsideration of the court's decision on the grounds that the court erred in applying the *McDonnell Douglas* criteria to plaintiff's claims and that the court failed to consider the evidence in a light most favorable to plaintiff. Plaintiff also asks the court to consider additional evidence not before the court when it rendered its decision. For the reasons set forth below, plaintiff's motion to reconsider is denied.

II. Legal Standard

The standard applied on a motion for reconsideration in this court has been accurately summarized as follows:

> Whether to grant to deny a motion for reconsideration is committed to the court's discretion. *Hancock v. City of Oklahoma City,* 857 F.2d 1394,

> 1395 (10th Cir.1988). In exercising that discretion, courts in general have recognized three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Estate of Pidcock v. Sunnyland America, Inc.*, 726 F.Supp. 1322, 1333 (S.D.Ga.1989); *see Major v. Benton*, 647 F.2d 110, 112 (10th Cir.1981).

Parker v. Board of Public Utilities of Kansas City, KS, No. 93-2262-GTV, slip op. at 3, 1994 WL 542130 (D.Kan. September 14, 1994); *see also Anderson v. United Auto Workers*, 738 F.Supp. 441, 442 (D.Kan.1990) (motion to reconsider appropriate when the court has obviously misapprehended a party's position, the facts, or the applicable law, or when a party introduces new evidence that could not have been obtained through the exercise of due diligence).

III. Discussion

Plaintiff's primary argument for reconsideration is that this court erred in applying the *McDonnell Douglas* shifting burdens test to plaintiff's claims because that test is not applicable in a case of after-acquired evidence. The court finds this argument by plaintiff to be totally without merit for the simple reason that the court did not base its original decision on the after-acquired evidence doctrine. The after-acquired evidence doctrine allows employers to escape liability or diminish damages in Title VII claims by introducing evidence of an employee's wrongdoing that the employer discovered after its initial employment decision. *See generally Summers v. State Farm*

Mut. Auto Ins. Co., 864 F.2d 700 (10th Cir.1988). In the present case, the evidence which the defendant relied on in demoting plaintiff was defendant's belief that plaintiff was not truthful in connection with an investigation undertaken by defendant following its receipt of a complaint from an employee at the Schnucks store where plaintiff was manager regarding an alleged encounter she had with plaintiff. This evidence was discovered prior to plaintiff's demotion and was the stated reason for his demotion. Similarly, the defendant presented evidence that it terminated plaintiff due to the fact that plaintiff misrepresented his marital status on his employment application for the purpose of gaining employment at Schnuck, that plaintiff continued to misrepresent his marital status following his employment, and that defendant therefore terminated him consistent with its policy of terminating persons found to have deliberately falsified their employment applications. Again, this evidence was discovered prior to plaintiff's termination and was in fact the stated reason for his termination.

The court's decision granting summary judgment in no way relied on the after-acquired evidence doctrine. Rather, it was based on plaintiff's failure to produce any evidence, beyond his showing of a prima facie case, that age was a determining factor in defendant's decision to demote and subsequently discharge plaintiff or that the immediate cause or motivating factor of defendant's adverse employment action was in retaliation for plaintiff's assertion of statutory rights.

Plaintiff next argues that the court inappropriately applied the shifting burden analysis described in *McDonnell Douglas* to plaintiff's FLSA retaliation claim. Plaintiff

cites no authority for this contention. This court believes that the shifting burden analysis described in *McDonnell Douglas* does apply to plaintiff's FLSA retaliation claims for the reasons set forth in the original order.

Plaintiff next argues that the court improperly applied the *McDonnell Douglas* analysis based on the Supreme Court's holding in *St. Mary's Honor Center v. Hicks*, ___ US.. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). In that case, a correctional officer alleged that St. Mary's Honor Center had demoted and subsequently discharged him on the basis of race. At trial, St. Mary's introduced evidence of two purported legitimate, nondiscriminatory reasons for its actions. The district court, acting as trier of fact in a bench trial, found that the reasons St. Mary's gave were not the real reasons for Mr. Hick's discharge. However, it nonetheless held that Mr. Hicks had failed to carry his ultimate burden of proving that his race was the determining factor in the decision to first demote and then to dismiss him. *Id.* at ___, 113 S.Ct. at 2748. The Court of Appeals set this determination aside on the grounds that once Mr. Hicks had proved all of the reasons given by St. Mary's for its actions to be pretextual, Mr. Hicks was entitled to judgment as a matter of law. *Id.* The Supreme Court reversed, holding that the trier of fact's rejection of an employer's asserted reasons for its actions does not entitle a plaintiff to judgment as a matter of law. *Id.*

Plaintiff in our case contends that, based upon language contained in *St. Mary's*, this court misapplied the *McDonnell Douglas* analysis in issuing summary judgment. Plaintiff relies on language wherein the Supreme Court stated that although a factfinder's disbelief of an

employer's proffered reason for a termination would not mandate judgment as a matter of law for plaintiff, it "may, together with the elements of a prima facie case, suffice to show intentional discrimination." *Id.* at ___, 113 S.Ct. at 2749. Plaintiff argues that due to this court's finding that the plaintiff had established a prima facie case from which an inference of retaliatory motive could be derived, plaintiff had come forward with facts from which a trier of fact could "disbelieve" defendant's proffered reasons for its actions and that plaintiff's claim should therefore withstand summary judgment.

The court does not find merit in plaintiff's argument. Under Plaintiff's argument, any plaintiff who was able to establish a prima facie case of discrimination would automatically survive summary judgment. The court does not believe this to be the law, nor a proper reading of *St. Mary's*. The court in *St. Mary's* was dealing with the issue of whether, at the trial stage, a plaintiff's disproving of an employer's proffered reasons for its actions was sufficient to entitle a plaintiff to judgment as a matter of law. The court held that it was not sufficient and that plaintiff still had the burden of proving that the employer had unlawfully discriminated. The court does not believe that the decision in *St. Mary's*, which dealt with the effect of an employer's stated reasons for taking an employment action being discredited at the trial stage, affects plaintiff's burden, at the summary judgment level, to produce specific facts, beyond mere conjecture, that an employer's explanation of its employment action is a pretext for intentional discrimination. *See Branson v. Price River Coal Co.*, 853 F.2d 768, 771-72 (10th Cir.1988).

Plaintiff next argues that the court erred by failing to consider the record in a light most favorable to the non-moving party. Plaintiff argues that the court failed to consider evidence of his performance prior to the incident leading to his demotion and also argues that the court should not have considered the affidavit of Bill Jones submitted by defendant.

As to plaintiff's evidence of his performance prior to his demotion, this evidence is relevant as to whether plaintiff produced evidence sufficient to show a prima facie case of discrimination. However, that evidence does not satisfy plaintiff's burden to come forward with evidence showing that defendant's proffered reasons for demoting him were pretextual. This evidence does not do anything to remedy plaintiff's failure to come forward with evidence creating a question of fact as to whether defendant's proffered reasons for its actions were pretextual.

Plaintiff also contends that the court should have disregarded the affidavit of Bill Jones, who stated that defendant maintains a policy of discharging employees who deliberately misrepresent information on their applications for employment. Plaintiff relies on *Welch v. Liberty Machine Works, Inc.*, 23 F.3d 1403 (8th Cir.1994). The court finds the facts in *Welch* distinguishable from the present case. In *Welch*, the defendant had failed to establish that it had a policy in place as to terminating employees for misrepresentations on its employment application prior to its discharge of the employee in question. The *Welch* court simply noted that the company president's statement that it would not have hired a worker had it known of the misrepresentation on the application, standing

alone, was insufficient to determine that the corporation had a settled termination policy. *Id.* at 1406.

In the present case, Mr. Jones' affidavit regarding defendant's policies is supported by evidence that defendant had terminated numerous employees in the past for falsifying employment documents. Unlike *Welch*, where the sole evidence of the company's termination policy was the submission of the company president's affidavit, defendant here produced evidence that when uncontested by plaintiff, established that its termination policy predated plaintiff's discharge. Accordingly, the court found it sufficient, along with other evidence introduced by the defendant, to show a legitimate, nondiscriminatory basis for defendant's actions.

IV. Conclusion

IT IS, THEREFORE, BY THE COURT ORDERED THAT plaintiff's motion to reconsider (Doc. #91) is denied.

IT IS SO ORDERED.

APPENDIX C

Gerald MARX, Plaintiff-Appellant,

v.

SCHNUCK MARKETS, INC., Defendant-Appellee.

No. 94-3436.

United States Court of Appeals,
Tenth Circuit.

Feb. 7, 1996.

Former employee brought action against former employer alleging violations of Age Discrimination in Employment (ADEA) and Fair Labor Standards Act (FLSA). The United States District Court for the District of Kansas, John W. Lungstrum, J., 863 F.Supp. 1489, granted summary judgment to employee. Employee appealed. The Court of Appeals, Lucero, Circuit Judge, held that: (1) employee failed to show that employer's proffered reason for termination was pretext for discrimination under ADEA; and (2) genuine issue of material fact precluded summary judgment on question of whether employer's reason for discharging employee was retaliation for having filed FLSA claim.

Affirmed in part and reversed and remanded in part.

Appeal from the United States District Court for the District of Kansas (D.C. No. 93-CV-2375).

Stephen J. Dennis of Dennis & Battis, P.A., Fairway, Kansas, for Plaintiff- Appellant.

Dennis G. Collins, Mary Beth Ortbals, and Lisa K. Boyer of Greensfelder, Hemker & Gale, P.C., St. Louis,

Missouri, and Nancy Landis of Spencer Fane Britt & Browne, Overland Park, Kansas, for Defendant-Appellee.

Before SEYMOUR, Chief Judge, McKAY, and LUCERO, Circuit Judges.

LUCERO, Circuit Judge.

Plaintiff-appellant Gerald Marx, a grocery store employee, appeals from the trial court's order granting summary judgment to defendant-appellee on his retaliation claim under the Fair Labor Standards Act, 29 U.S.C. §§ 201- 219, and his discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. We have jurisdiction under 28 U.S.C. § 1291.[1] We affirm in part and reverse in part.

I.

"Oh, what a tangled web we weave, when first we practice to deceive!"[2] Plaintiff's wife, Mrs. Terri Lynn Marx, began employment with defendant on February 25, 1991, under the name "Ms. Green." At that time, plaintiff

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[1] Plaintiff's amended complaint also included a supplemental state law claim for breach of employment contract and an FLSA claim for unpaid overtime pay. After plaintiff filed his notice of appeal, the district court dismissed these claims by stipulation of the parties and entered final judgment on the claims now before this court. Plaintiff's notice of appeal ripened at that point, allowing this court to assume jurisdiction over this appeal. *See Kelley v. Michaels*, 59 F.3d 1055, 1057 (10th Cir.1995); *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645 (10th Cir.1988). This case is ordered submitted without oral argument in compliance with the applicable rules.

[2] Sir Walter Scott, Marmion, canto VI, stanza 17 (1808).

had been married to her for more than nine months. Notwithstanding defendant's informal policy of not hiring the spouse of a current employee, plaintiff applied for a job with defendant three days after his wife began her employment.

On his application and all other necessary forms, plaintiff listed his marital status as "divorced." He omitted any reference to Mrs. Marx. On his Federal IRS W-4 form he declared that he was "single." Plaintiff contends that he did this because the store manager encouraged him to conceal his marital status.

Defendant tells us that it was ignorant of the couple's true marital status, when it hired plaintiff as a dairy/frozen sales person in March, 1991, and that the couple created their own dilemma: Should the couple pretend not to know each other, or should they present some explanation to their co-employees? They chose the latter approach.

The plot of the story, we are told, was a simple one. Plaintiff and his wife would pretend to fall in love, move in together, become engaged, and ultimately announce their marriage. As "subsequently married" employees, plaintiff and his wife would likely be allowed to continue working for defendant.

At first, the plan went well. The Marxes pretended to have begun dating as co-employees. In sequence, they announced to their co-workers their courtship, engagement, and ensuing marriage. Plaintiff changed his emergency contact person with defendant to "Ms. Green," his "fiancee." Mrs. Marx told her fellow employees she wanted to marry plaintiff and have a baby.

The plan resulted in complicating consequences. Plaintiff's male co-workers threw a bachelor party to help Marx and another affianced employee celebrate their "last hours of freedom."[3] Their co-employees also hosted a surprise wedding shower for the couple. There was, of course, no wedding. Unbeknownst to their fellow employees, that ceremony had already occurred.

In the interim, plaintiff advanced to "associate of the month" and in August, 1992, he was promoted to dairy/frozen foods manager. In October, 1992, plaintiff's wife reported to defendant that she believed defendant was failing to pay overtime in accordance with federal law. Defendant promptly conducted an investigation of its wage and hour practices. It developed and circulated an employee overtime survey, approved by the United States Department of Labor, to allow employees to claim any unpaid overtime. Two weeks later, defendant fired Mrs. Marx, citing falsifications on her application for employment and on other official documents. Mr. and Mrs. Marx responded by filing a class action suit based on defendant's failure to pay overtime.

In November, 1992, defendant began citing plaintiff for deficiencies in his job performance. The record contains numerous handwritten entries detailing plaintiff's

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[3] The frivolity of the event should best be characterized in the memorable words of then Chief Judge Cardozo: "the antics of the clown are not the paces of the cloistered cleric." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173, 174 (1929). The merriment ended with a photograph taken of the plaintiff sitting in a limousine, provided by the co-employees, with an underwear band on his head.

omissions in stocking and pricing defendant's merchandise through January, 1993.

Defendant mailed the overtime surveys to its current and former employees in December, 1992 and January, 1993. In February, 1993, defendant's management received a complaint from one of plaintiff's co-employees that plaintiff had harassed her about completing the survey. Within three days, defendant questioned plaintiff about his co-worker's complaint against him and instructed plaintiff to complete a questionnaire concerning the incident. Plaintiff responded in writing that he did not remember anything about the events described in the questionnaire. Believing plaintiff had lied, defendant demoted him to stock clerk and transferred him to a different store.

Plaintiff responded by filing this suit, in which he alleged age discrimination. Shortly after an amendment to his complaint adding a claim under the FLSA, defendant took plaintiff's deposition. By the time of his deposition, defendant had become aware of plaintiff's misrepresentations concerning his marital status. The tangled web began to unravel.

Defendant took full advantage of plaintiff's depositions to subject him to withering examination concerning his previous fabrications. Plaintiff was asked about the wedding shower. He admitted attending the shower in April, 1992, but claimed it was for his co-employee and otherwise could not remember its purpose, anything that was said, any photographs, or any other significant details of the party. He did admit that it seemed like the party was for "some wedding or something," but stated he did not pay much attention to it. Plaintiff's statements

are contradicted by affidavits of more than twenty of his fellow employees. They state that plaintiff could not have failed to know that he was attending a wedding shower for himself and Mrs. Marx.

The record reveals numerous other instances of what defendant calls plaintiff's "pinnochion" behavior. On June 27, 1994, the day before the pretrial conference in this case, defendant fired plaintiff for lying. During the pretrial conference the next day, plaintiff expanded his FLSA claim to include a claim of retaliatory firing.

II.

We review de novo whether defendant is entitled to summary judgment. *Durham v. Xerox Corp.*, 18 F.3d 836, 838 (10th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 80, 130 L.Ed.2d 33 (1994). It is well settled that summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

III.

We turn first to plaintiff's ADEA claim.[4] A plaintiff demonstrates a prima facie case of age discrimination by

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[4] On appeal, plaintiff alleges that his firing constituted a discriminatory retaliation under the ADEA. This claim would have presented a closer question than the one analyzed in part III, however, plaintiff did not raise the ADEA retaliation claim below, and we will not entertain it for the first time on appeal. *See Oyler v. Allenbrand*, 23 F.3d 292, 299 n. 8 (10th Cir.1994). The district court treated both the demotion and the firing as discrimination claims under the ADEA, and we do review that ruling.

showing that (1) he was within the protected age group; (2) he was doing satisfactory work; (3) he was discharged despite the adequacy of this work; and (4) he was replaced by a younger person. *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir.1986). Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a facially nondiscriminatory reason for the adverse employment decision. *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir.1995) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973)). "At the summary judgment stage, it then becomes the plaintiff's burden to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual – i.e. unworthy of belief." *Id.* (citing *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir.1994)).

In *Randle*, through en banc consideration of footnote 17, *id.* at 452 n. 17, we settled the plaintiff's burden at the summary judgment stage. An ADEA cause of action qualifies for the same analysis. If the defendant has advanced a facially nondiscriminatory motive for the discharge, to avoid dismissal on summary judgment the plaintiff must present evidence that the nondiscriminatory reason advanced by the defendant "was pretextual – i.e., unworthy of belief." *Id.* at 451. If a civil rights plaintiff proffers such evidence, the motion for summary judgment must be denied. *Id.* at 452 n. 17. Our task, then, is to determine where plaintiff's ADEA claim fits in the *Randle* topography.

The district court determined, for summary judgment purposes, that plaintiff established a prima facie case of

discrimination. In response, defendant advanced two nondiscriminatory justifications: (1) with regard to his demotion, that plaintiff lied on the questionnaire submitted to him after the "harassment" incident, and (2) with regard to his firing, that plaintiff lied on his employment application, in statements to his fellow employees concerning his marital status, and during depositions taken in this case. Defendant having advanced these facially nondiscriminatory reasons, the issue remaining for our determination is whether plaintiff proffered evidence that the reasons asserted by defendant are pretextual. *Id.* at 451. "A plaintiff demonstrates pretext by showing either 'that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence.' " *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir.1994) (emphasis supplied) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981)).

In deciding whether the plaintiff's proffered evidence of pretext is adequate to avoid summary judgment, we next survey the ridge created by footnote 14 of *Randle*. (In doing so, we sympathize with practitioners who must labor over footnotes in our decisions – with which this opinion is itself burdened – to determine the contour of the divide.) Footnote 14 denotes the rule that if a civil rights plaintiff concedes that the real reason for the employer's action was a motive not prohibited under the civil rights laws, such a concession mandates granting of summary judgment to the employer. *Randle*, 69 F.3d at 451 n. 14. By implication, footnote 14 connotes the rule that if

a civil rights plaintiff concedes, for purposes of establishing pretext, that the sole reason for the discharge was a motive prohibited by a law entirely different from the one under summary judgment scrutiny, such a concession mandates grant of summary judgment as to the latter claim.

Thus, we ask: In advancing evidence of pretext here did the plaintiff fatally cripple his ADEA claim by asserting, as his only supportable basis for showing pretext, that the "real" reason for his discharge was defendant's retaliation for his having filed a FLSA claim? We conclude that he did. Scrutinizing the briefs and summary judgment record, it is clear that plaintiff's consistent position has been that reasons advanced by the defendant for his discharge are not the true reasons, that instead, retaliation for the filing of FLSA claims is the true reason. The plaintiff argues here that the defendant's own evidence supports plaintiff's theory of retaliation for "conduct which would clearly have been 'protected' under the FLSA." Appellant's Reply Br. at 1. Reviewing the record de novo, as is our duty under *Durham v. Xerox Corp.*, 18 F.3d at 838, we conclude that there is sufficient evidence in the record to create a genuine issue of fact as to whether the defendant's reason for discharging the plaintiff was retaliation for having filed a FLSA claim. In advancing his theory of FLSA retaliation in order to counter the defendant's proffered nondiscriminatory motives, however, we also conclude on the record before us that the plaintiff has effectively abandoned his ADEA claim.

Relying upon *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), the

trial court essentially concluded that the relevant inquiry to determine if there is a genuine issue of material fact as to whether the plaintiff has proffered the quantum of evidence of pretext necessary to rebut the defendant's asserted nondiscriminatory reason, is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S.Ct. at 2512. The trial court decided that the plaintiff did not offer any evidence which rises to the level of creating an *Anderson v. Liberty Lobby* evidentiary dispute on the pretext issue. We agree. The evidence advanced by plaintiff to support his claim of FLSA retaliation might be believed, but, even if believed, it does not allow an inference of ADEA discrimination. If plaintiff's claim of FLSA retaliation is not believed, he suffers dismissal because on the record before us any other evidence of pretext is so one-sided that the defendant would prevail as a matter of law.

Our decision in this case should not be read as a move toward a "pretext-plus" standard. Our en banc decision in *Randle* has placed that issue in repose. *See* 69 F.3d at 452 n. 17. Nor should it be read as requiring summary judgment for defendant if a civil rights plaintiff who asserts multiple civil rights claims, in the course of proving pretext, stresses one claim more than another. Indeed, in a typical case, all claims will survive. Here, plaintiff advances evidence of pretext which, if believed by the jury, supports only the proposition that defendant's true and sole reason for firing him was retaliation for his having filed, and having encouraged others to file, an FLSA claim. The record before us does not allow any

other inference. Thus, we affirm the summary judgment dismissal of plaintiff's ADEA claim.

IV.

We turn next to plaintiff's FLSA retaliation claim. This court applies a "motivating factor" test to such claims. "When the 'immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights, the discharge is discriminatory under § 215(a)(3) whether or not other grounds for discharge exist.' If retaliation is not the motivating factor, then the discharge is not unlawful." *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir.1992) (citations and footnote omitted).

Plaintiff argues that defendant retaliated against him after he and his wife filed their FLSA claim. Retaliation allegedly began with plaintiff being "written up" following his FLSA complaint, escalated with his demotion for lying about discussions relating to a FLSA questionnaire, and continued with the use of discovery in his FLSA suit to dredge up information concerning unrelated wrongdoing. It ended with his termination, which was based on information revealed through discovery.

We have recognized that protected conduct closely followed by adverse action may justify an inference of retaliatory motive. *See Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 386 (10th Cir.1984) (Title VII judgment upheld based in part on adverse action closely following protected activity). Although we have rejected attempts to unduly stretch the "close temporal proximity" required under

this standard, *see Candelaria v. EG & G Energy Measurements, Inc.*, 33 F.3d 1259, 1262 (10th Cir.1994), and cases cited therein, we also believe that the phrase "closely followed" must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the FLSA complaint and only culminates later in actual discharge. *Cf. Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 377 n. 4 (6th Cir.1984) (reversing judgment for defendant and remanding for further consideration of Title VII retaliation claim where discharge occurred nearly one and one-half years after complaint but pattern of retaliation allegedly began soon after complaint was filed). Granting plaintiff the benefit of every favorable inference, the pattern of actions taken by defendant precludes summary judgment concerning defendant's motivation in demoting plaintiff and terminating his employment.[5]

There are genuine issues of material fact concerning defendant's motivation. Such questions of fact, in retaliation cases as well as discrimination cases, are for the trier of fact. *See Randle*, 69 F.3d at 453. We therefore reverse summary judgment on plaintiff's FLSA retaliation claim.

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[5] In his motion for reconsideration before the district court, plaintiff argued that defendant could not rely on the misstatements uncovered during the discovery process as justification for terminating his employment, citing *McKennon v. Nashville Banner Publishing Co.*, ___ U.S. ___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). The district court correctly concluded that it had not relied on after-acquired evidence. McKennon does not apply under the circumstances of this case.

V.

The judgment of the district court is AFFIRMED save for summary judgment on plaintiff's retaliation claim, which is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

APPENDIX D

Schnucks

The Friendliest Stores in Town

February 15, 1993

Mr. Jerry Marx
Dairy/Frozen Foods Manager

Dear Jerry:

I am writing this letter to you so that there will be no misunderstanding between us. The purpose of this correspondence is to make an investigation into a complaint that has been brought to our attention by Schnuck's associate Tracy Stephenson. Ms. Stephenson reports that you approached her concerning the Company's survey results during her working hours while she was making new tags for certain Company products. This associate also reports that she stays late in the evening in order to avoid discussing this same matter with you. In order to complete our investigation, please provide responses to the following questions:

1. On February 9, 1993, at about 9:30 a.m., did you interrupt Ms. Stephenson while she was working to ask her about her discussion of the Company's wage and survey with two management representatives?

Don't remember

2. Were you working when you approached Ms. Stephenson?

N/A

3. Did you tell her essentially that if she believed the Company had discriminated against her, then she could hire a lawyer to sue it for a lot of money as you had done?

N/A

4. Did Ms. Stephenson reply that she was not money hungry?

N/A

5. Did you then respond: "Well, I am?"

N/A

6. How many times have you interrupted Ms. Stephenson during her working time to ask her about the Company's wage and hour survey, to tell her about the lawsuit, or to comment about either the survey or your suit, or both?

Don't remember interrupting her while working

7. Have you interrupted the work of any other associates besides Ms. Stephenson to ask questions about the wage and hour survey, to tell them about your lawsuit, or to comment about either the survey or your suit, or both? (If so, provide the names and the number of employees you approached during working hours.)

N/A

8. If you deny Ms. Stephenson's report, please explain what you believe caused her to make false accusations against you?

Don't know

In closing, the Company reminds you of your position as the Company's Dairy/Frozen Foods Manager and emphasizes your responsibility to avoid any type of retaliation against Ms. Stephenson. Upon reviewing your written responses, we will inform you of the results of this investigation.

Sincerely,

/s/ Phil Lunn
Mr. Phil Lunn
Store Manager

He took a copy of this Survey with him

APPENDIX E

Schnucks

The Friendliest Stores in Town

February 19, 1993

Mr. Jerry Marx
Dairy/Frozen Foods Manager

Dear Jerry:

We have completed our investigation of the complaints which Ms. Stephenson filed against you. Specifically, Ms. Stephenson made the following complaints: 1.) that you interfered with the performance of her job duties on February 9, 1993 when you engaged her in discussions concerning the company's wage and hour survey; and 2.) that Ms. Stephenson rearranges her work priority in order to avoid discussions with you on the Company's wage and hour survey and your lawsuit against the Company.

On February 15, 1993, we met with you, and you stated that you did not remember any of the discussions which Ms. Stephenson reported to this Company as having occurred on February 9, 1993. You also noted during the Company's investigation that you do not know of any reason Ms. Stephenson would make false accusations against you. (A copy of your response is attached as Exhibit A.)

Frankly, after completing the investigation, we believe in our opinion that you failed to tell the truth in your written response. It is simply incomprehensible for

us to believe that you were unable to recall anything about a conversation that occurred six (6) days ago. This conclusion is also based upon your acknowledgment that you were unable to state any reason as to why Ms. Stephenson would make false accusations against you. As the Dairy/Frozen Food Manager, you attend weekly management meetings, and are privy to Company confidential information. Because of your position and your responses to the Company's investigation, we have made the decision to remove you as a manager, and to reduce you to a full-time Dairy/Frozen Food Clerk. You are currently paid at the effective rate of $9.50 an hour, and you shall receive the same rate of pay. (This is $.50 an hour over the rate normally paid for full-time dairy frozen food clerks.) You will continue to receive all of your fringe benefits, excluding the five percent (5%) department manager bonus. You will continue to work the same hours, but you will be immediately transferred to our Metcalf store in accordance with the Company's policy. In short, we expect our managers to be truthful, and you have not been truthful in connection with the Company investigation. (A copy of the disciplinary form is attached.)

With regard to Ms. Stephenson's complaints as outlined above, we wish to advise you that it is inappropriate for you to be discussing either your lawsuit or the Company wage and hour survey during working time in such a manner which interferes with either your work duties or the work duties of other associates. We also wish to bring to your attention that Ms. Stephenson has advised this Company that she does not wish to speak to you on these matters. No formal disciplinary action is

being taken against you as a result of Ms. Stephenson's complaints; however, if you do not refrain from further conduct which interferes with either your work duties or the work duties of other associates, we will be required to take appropriate disciplinary action. Lastly, you should not retaliate against Ms. Stephenson or any other employee for filing these complaints against you. In addition, please let me know if you have any questions.

Please report to the Store Manager at Metcalf at 6:00 a.m. on Saturday, February 20, 1993.

Sincerely,

/s/ Phil Lunn
Mr. Phil Lunn
Store Manager

APPENDIX F

Schnucks

The Friendliest Stores in Town

June 27, 1994

VIA HAND DELIVERY

Mr. Gerald Marx
11409 West 65th Street
Shawnee Mission, Kansas 66202

Dear Mr. Marx:

On November 30, 1993, during the first day of your deposition in connection with your discrimination lawsuit, it was established that you apparently had falsified various employment documents and defrauded your co-workers and Schnucks management regarding your marital status, (i.e., divorced on one form and single on another form when, in fact, you were married to the store's confidential secretary). At that deposition, you were unable to provide adequate explanation as to why your employment documents contained incorrect information and why certain relevant information was omitted. As you know, since that time, we have been investigating these apparent deliberate misrepresentations and omissions in your employment documents, as well as the claims in your lawsuit.

As part of our investigation, many of your co-workers were interviewed in December 1993 and January 1994, and these associates corroborated our concerns that you deliberately falsified employment documents and that you deceived your co-workers as to your marital status.

Specifically, your co-workers stated during the investigation why they believed that you were not married between when you commenced working with Schnucks in March of 1991 until June of 1992.

As part of the continuing investigation, records from your prior employer, Food Barn, were subpoenaed. The Food Barn records were received on February 10, 1994. The Food Barn records disclosed that only ten (10) days prior to misrepresenting to Schnucks and omitting critical facts relevant to your marital status and present address, you supplied correct information to Food Barn relating both to your marital status and current address. You completed your Food Barn application on February 18, 1991, and your Schnucks application on February 28, 1991.

I then sent you a letter on March 7, 1994, requesting an explanation for the discrepancies in your deposition, the Food Barn documentation, your Schnucks employment documents, and your conduct and representations in the work place concerning your marital status. On March 23, 1994, you submitted your answer to the questions, however, you failed to answer several questions as to your marital status and present address when you applied for employment at Schnucks on the basis of a claimed "marital privilege". In addition, you specifically denied in your response that a bachelor party was held partly in your honor at a time when you were married. Moreover, as to this bachelor party, you stated in your response that you were unable to recall if a "lap dance" was purchased for you, and that you were likewise unable to recall what was the band tied around your head. (A copy of your response is attached.)

Despite your failure to provide adequate explanations regarding your numerous, and apparently deliberate, misrepresentations and omissions, we continued the investigation in April 1994 by interviewing numerous associates as to the bachelor party. In connection with this investigation several of your co-workers confirmed: that you knew the party was for both you and Dan Woodland, that a "lap dance" was purchased for both you and Dan Woodland, and that toasts were made that this was the last night of freedom for both you and Dan Woodland. In addition, Dan Woodland stated that the party was held for both of you since you both sat side by side during the "lap dance," the whipped cream licking and when your underwear was bitten off at the waist band by a paid female nightclub employee. These associates again corroborated Schnucks' concern that you deliberately falsified employment documents and deceived your co-workers and Schnucks management regarding your marital status.

Recently, on June 2, 1994, during the final day of your deposition, you dropped the "marital privilege" claim and admitted that you incorrectly completed the various Company forms as to your marital status shortly after your wife told you it would be best that the two of you were not married so as to keep everyone from getting into trouble. Specifically, you testified at your deposition as follows:

Question: Please state why you failed to acknowledge that you were married to Terri Lynn Marx when you applied for employment with Schnucks?

Answer: There is a situation that I can recall that (Store Manager) Dan Kunz had told her that it would be best that we were not married to keep everyone from getting into trouble, and I assume that he meant himself too.

You further explained your answer: "It's like I stated before, that is he (Kunz) was afraid if Schnucks found out that he was allowing a married couple to work in the store, that he would be in trouble." (Your June 2, 1994 testimony differs from your December 1, 1993 testimony. Specifically, in response to the questions, "Isn't it a fact that you represented on the application that you completed with Schnuck Markets your marital status when you applied on February 28th, 1991, since you believed that you wouldn't be hired if you inserted on the application that you were married to Terri Lynn Marx?", you responded, "No." You also stated at your December 1, 1993 deposition that Ms. Marx never told you to misrepresent any information on any of Schnucks' employment forms.)

As to why you listed on your February 18, 1991 Food Barn form that you were married and then listed on your February 28, 1991 Schnucks form that you were divorced, you admitted in your June 2, 1994 deposition that you were married to Ms. Marx when you completed the Food Barn form, that was your signature on the Food Barn form, that you might have marked "married", but that you didn't know. As to why you indicted "D" for divorced on Schnuck's form ten (10) days after completing the Food Barn form, when you had been married to Ms. Marx since 1990, you stated: "I don't know the reason why." As to why you marked "D" on Schnucks' form, you

also stated at your June 2, 1994 deposition: "You know, I don't recall. I know that – if I recall, when I marked that, I thought about being divorced, and that's what I marked down there. I was just recently divorced." (You married Ms. Marx on May 12, 1990 and completed your Schnucks' application on February 28, 1991.) Lastly, your wife listed 9126 Lowell as her address when she applied at Schnucks on February 20, 1991. You also listed 9126 Lowell as your address when you applied at Food Barn on February 18, 1991. You listed 5220 Nieman as your present address when you applied for employment with Schnucks on February 28, 1991. You admitted in your November 30, 1993, deposition that you were living at 9126 Lowell when you applied at Schnucks. In response to the Company's questionnaire on March 23, 1994, you stated that you did not know the reason why you listed 5220 Nieman as your address at your November 30, 1993 deposition. Finally, at your June 2, 1994, deposition, you gave the following explanation why you listed Nieman at a time that you were living on Lowell: "I really can't recall, other than it was the address my wife had given me to use for contact purposes for Schnucks".

Following your deposition on June 2, 1994, I again personally spoke with Dan Kunz, and he emphatically denied both orally and in writing any such conversation with Ms. Marx wherein she told him that the two of you were married at the time you were seeking employment with our Company. At the time of your hire, Ms. Green (name that your wife used when she was hired by Schnucks) stated to Mr. Kunz that you were a "friend" of hers with food market experience. Additionally, Mr. Kunz specifically remembers that approximately three to four

weeks after you were hired, he and Joe O'Toole were walking towards the rear of the Shawnee store when they both observed you and Ms. Green walking across the back of the store holding hands. At that point, Mr. O'Toole inquired, "What is this?" (referring to two associates in uniform holding hands on the sales floor) to which Mr. Kunz laughingly replied, "I guess they must be more than just *friends*." Moreover, Mr. Kunz's wife helped to plan a wedding shower for both Ms. Marx and you in either April or May 1992, and he assured me that you personally thanked everyone for this surprise wedding shower. In addition, Mr. Kunz pointed out to the Company that he is very frugal, and that he would never have purchased a wedding present for both of you in either April or May 1992 had he known you were married to Ms. Marx in May of 1990.

In addition, I also reinterviewed Karen Kunz and she verified to me her previous statement that you personally thanked her for giving the shower, and that you affectionately hugged her and told her how much you appreciated the shower. In addition, another co-worker reported to management in connection with its investigation that there was no doubt that this was a wedding shower. At the close of the shower, this co-worker stated: "I told Jerry that I hoped he and Terri would be very happy, because he made Terri very happy . . . " and that you responded, "Thank you." Moreover, your admitted falsifications and misrepresentations give credibility to your co-workers' contentions that you and your wife deliberately deceived them about your marital status.

As a result of this investigation, we have no alternative but to terminate your employment effective immediately.

We have concluded the following as the factual basis for your termination:

1. That you falsified your employment application (i.e., listing an incorrect home address and phone number, and omitting that your wife was employed by Schnucks);

2. That you falsified Schnucks' New Hire Form (i.e., incorrectly listing your marital status as "divorced," listing an incorrect residence address, and omitting your spouse's name and birthday);

3. That you falsified your Federal IRS/Form W-4 (i.e., incorrectly representing that you were "single" when in fact you were married, and again listing an incorrect residence address);

4. That at your November 30, 1993, and June 2, 1994, depositions, you misrepresented that you were unaware that a wedding shower was being held in your and your wife's honor;

5. That you denied in your answers on March 23, 1994 to the Company questionnaire, that the bachelor party was also held in your honor;

6. That at your June 2, 1994 deposition, you misrepresented that you were unaware that a bachelor party was held jointly in your and Dan Woodland's honor; and

7. That at your June 2, 1994 deposition you admitted that you falsified and or deliberately omitted pertinent information to help you obtain employment with our Company;

8. That you deliberately gave untrue statements, misleading answers and concealed facts in your employment application in order to secure employment with our Company. It is our Company policy to terminate

any associate who we conclude deliberately falsifies the employment appication [sic]. This policy is printed as part of the Assoicate [sic] Agreement section of our employment application that you, and all applicants are to read and sign as part of the employment process. (A copy of the employment application you signed is attached.)

Specifically, the Associate Agreement states in part:

> In consideration of my employment and in consideration of the salary, commissions or wages to be paid to me during the continuance of such employment, I agree as follows:
>
> * * *
>
> (h) I warrant the foregoing to be a truthful and complete statement of facts. Furthermore, any untrue or misleading answer or concealment of any fact will constitute sufficient cause for my immediate discharge.

As previously noted, you listed an incorrect home address and phone number, and omitted listing that your wife was employed by Schnucks. In concluding that this was a deliberate misrepresentation by you, our Company has also considered the other Company documents and the Federal IRS form that you falsified. When your incorrect employment documents are viewed in context with your Food Barn application correctly completed ten (10) days earlier, wherein you listed your correct address and marital status, as well as your June 2, 1994, deposition, it is apparent that you falsified and or deliberately omitted pertinent information to help you obtain employment with our Company.

9. That you and your wife both engaged in a conspiracy to gain employment with our Company, embarked

upon a deliberate course of conduct from the outset of your employment to defraud your co-workers and members of management as to your marital status. (i.e., pretending to be a "friend" of Terri Lynn Green when first employed, pretending to be "dating" Terri Lynn Green the first eight to ten months employed, pretending to move and begin "living together" with Terri Lynn Green as your "fiancee" in the later part of 1991, to cause your personnel records to be changed in 1991 to reflect your "new" emergency contact to be "Terri Lynn Green – relationship – Fiancee" with the same address and phone number as yours, permitting Schnucks' management and your co-workers to throw a bridal shower for you, accepting shower and wedding presents (a Waterford crystal vase, dinner ticket for the New Theatre, candle sticks, etc.), permitting your co-workers to honor you and another employee at a bachelor party (including the cost of a limousine and the payment for a "lap dance") when, unbeknownst to Schnucks' management and your co-workers, you had already been married for two years).

Our Company placed much significance on the fact that at your June 2, 1994, deposition, you admitted that you incorrectly completed various Company employment forms after your wife told you it would be "best" that the two (2) of you were not married.

In addition, we also considered the numerous misrepresentations made by your wife in connection with her employment application, resume and work history in her effort to secure employment with our Company; including that she used the social security number of her first husband, that she indicated that she graduated from Longmont High School when, in fact, she had not graduated from high school, that she

indicated that she attended the University of Colorado from 1975 through 1981, when, in fact she only attended the University from August 29, 1980 through October 2, 1980, and that she failed to list two (2) previous employers on the Company's application form which she signed. It is apparent that you and your wife deliberately conspired to defraud your co-workers, members of management, and the Company as to your marital status to assist you in gaining employment with our Company.

A copy of this letter has been furnished to your attorney.

Sincerely,

/s/ William H. Jones
William H. Jones
Vice President, Human Resources

WHJ/hn

APPENDIX G

JOHNSON v. UNIV. OF WISCONSIN

U.S. Court of Appeals,
Seventh Circuit

LAUREL A. JOHNSON, Plaintiff-Appellant
v. UNIVERSITY OF WISCONSIN-EAU CLAIRE, et al., Defendants-Appellees, No. 95-1361, November 15, 1995

Appeal from the U.S. District Court for the Western District of Wisconsin. Affirmed.

Douglas O. Johnson, Eau Claire, Wis., for appellant.

Jennifer S. Lattis, David C. Rice, and Monica Burkert-Brist, Assistant Attorneys General of Wisconsin, for appellee.

Before FLAUM, KANNE, and ROVNER, Circuit Judges.

Full Text of Opinion

JOEL M. FLAUM, Circuit Judge: – Laurel Johnson sued the University of Wisconsin-Eau Claire pursuant to both 42 U.S.C. §1983 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-2(a) and 2000e-3(a). Johnson claimed 1) that she was subject to wage discrimination for academic years 1990-91 and 1991-92 because of her sex and 2) that she was retaliated against for protesting the wage discrimination in June of 1991, for complaining about her 1991-92 appointment letter, and for filing a complaint in January 1992 with the Equal Employment Opportunity Commission. Johnson

alleged that the University, through the named defendants, retaliated against her by limiting the number of classes she was assigned, reducing her wages, giving her a low performance rating, and ultimately terminating her employment. The district court granted summary judgment for the defendants, and Johnson appealed. We affirm.

I.

From 1984 until 1993 Laurel Johnson worked for the University of Wisconsin-Eau Claire ("UWEC") teaching composition courses in the Department of English. Throughout this period, Johnson was employed under successive, one-year, fixed-term, "Option 2" contracts.[1] Unlike faculty members, who generally hold PhD degrees and either have tenure or are being considered for tenure, academic staff like Johnson rarely have PhD degrees and

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[1] Instructors in Johnson's position (i.e., non-tenure track) hired after 1985 could no longer have an "Option 2" contract, but instead were given an "Option 3" contract. Both Option 2 and Option 3 academic staff were given one-year contracts that prominently stated that these contracts provide no opportunity for tenure, no matter how many times the appointment is renewed. The only difference between the Option 2 contracts and the later Option 3 contracts was that the Option 2 contracts could be renewed more than 6 years in a row without having to be changed, while the Option 3 contracts would have to be changed to "rolling horizon" contracts if employment went beyond 6 years. This distinction is irrelevant to our decision. For the purpose of this opinion, Option 2 and Option 3 employees will be treated as a group and termed "academic staff." Tenured or "tenure track" (i.e., probationary) teachers will be termed "academic faculty" or "faculty."

are given only one-year contracts, with no expectation of renewal. According to the UWEC Faculty and Academic Staff Handbook, such "fixed-term" appointments are "renewable solely at the option of the University, and carry[ ] no expectation of re-employment beyond the stated term, regardless of how many times renewed." Furthermore, all of Johnson's contracts contained the following language: "Please note that it is not intended at present to renew this fixed term appointment." The contracts also expressly noted that tenure was not possible under her contract.

Roger Anderson was also hired in 1984 by the English Department under an Option 2 contract. Anderson and Johnson both had masters degrees. Johnson's initial salary "base rate" was $800 higher than Anderson's, apparently because Johnson had two years prior experience teaching high school. At the time, base rates for academic staff were established through a recommendation by the relevant department, which would have to be approved by the Dean of the School of Arts and Sciences and the Chancellor's office. Actual compensation each year was determined by multiplying the base rate by the percentage of a full teaching load that was taught. A full teaching load was 12 credits per semester, 24 credits per year.

A. 1990-91 Academic Year

In succeeding years, Johnson and Anderson were rehired annually under similar one-year, fixed-term contracts. While their appointment percentages varied, they received incremental raises annually, and Johnson's base

rate remained approximately $800 higher than Anderson's until the 1990-91 academic year. Johnson's base rate for 1990-91 was raised incrementally to $19,450, and she was given a 100% teaching appointment for both semesters. Anderson's base rate for the year was raised incrementally to $19,000, but he was allotted only a 83.33% (10 credits) fall teaching load and a 41.67% (5 credits) spring teaching load. As a result, Anderson would have made $7916.35 for the fall and $3958.65 for the spring, for a total of $11,875 for the year. Teaching 15 credits for this salary amounts to a rate of $791.67 per credit. (Since Johnson taught a full load, she was effectively paid $810.42 per credit.)

Since occasional or one-time temporary teachers were paid $800 per credit, Anderson complained to Lee Grugel, Dean of the School of Arts and Sciences. Dean Grugel then wrote a letter to the Acting Vice Chancellor, Patricia Ostmoe, recommending that for the 1990-91 school year Anderson be paid at the $800 per credit rate, stating that this rate should be "the absolute minimum for a person of Mr. Anderson's experience and qualifications." The per credit approach was approved, and Anderson was paid $8000 for the fall term (10 credits) and $4000 for the spring term (5 credits).[2] This would

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[2] Johnson maintains that Anderson was actually given a base rate of $20,000 for the 1990-91 academic year. To support this claim, she points to a series of notes found on Anderson's 1990-91 contract letter, filed by UWEC. At the bottom of the contract is a typed note, which reads as follows:

have increased his academic year salary by only $125, from $11,875 to $12,000. Because Anderson's spring appointment was later increased to 8 credits, he ended up being paid $14,400 for the year (18 credits at the $800 per credit rate).[3] It should be noted that even teaching a full load at the $800 per credit rate amounts to a yearly salary of $19,200, i.e., $250 less than Johnson's base rate and actual salary for the 1990-91 academic year.

B. 1991-92 Academic Year

On May 13, 1991, Nadine St. Louis, Chair of the English Department, recommended an "equity" raise in

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11/2/90

To: Harry

From: Barb Gerri Dudansky stopped over – wondering about Roger L. Anderson pay rate. She thinks the $20,000 is below the rate for Lecturer. (Never mind that she made a mistake & paid him @ a $30,000 rate.) Let me know please.

A handwritten note at the top of the contract letter, apparently responding to the typed note at the bottom, reads as follows: "The min. for Lecturer is .80 of Assist. Prof. min., so $20,000 is above that. This is *not* his base. This is $800 per credit. See me? [signed] H" (emphasis in original). While the meaning of the typed note is not entirely clear, the handwritten note makes clear that Anderson's contract was calculated on an $800 per credit basis, rather than according to the traditional base rate approach. The notes provide no support for Johnson's claim that Anderson was given a $20,000 base rate for the 1990-91 school year.

[3] If Anderson was being paid at a $20,000 base rate, he would have received $15,000 for teaching 18 credits (a 75% teaching load). Johnson does not deny that Anderson received only $14,400 for the 1990-91 school year.

the base rates of both Johnson and Anderson to $21,000 for the 1991-92 academic year.[4] The procedure for establishing salary levels at the time was that the chair of the department would make a recommendation, which could be accepted, rejected, or altered by the dean of the college. The college dean would then send a final salary recommendation to the vice chancellor, who would review the request and prepare an appointment letter for the chancellor's signature. St. Louis's recommendations for both Johnson and Anderson were approved and signed by Dean Grugel on May 20, 1991 and by Vice Chancellor Marjorie Smelstor on May 23, 1991.

These salary recommendations eliminated the previous base-rate differential between Anderson and Johnson. St. Louis notes in her affidavit that Johnson's high school teaching experience did not affect her recommendation, since her primary aim was to improve the very low salary of both within the budget limitations of the department and to establish base rates exceeding the $800 per credit that temporary teachers received. Dean Grugel likewise states in his affidavit that it would not have been uncommon at UWEC for minor pay distinctions, like one premised on such a small differential in experience, to be eliminated during subsequent pay increases.

When the actual contract letters were sent on June 10, 1991, however, Anderson's base rate was $21,000, while Johnson's was only $19,450. Upon learning of the situation shortly thereafter, the new Acting Chair of the

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[4] The word "EQUITY" was typed next to the recommended salary base of $21,000 on the salary recommendation forms for both Johnson and Anderson.

Department of English, Bernard Duyfhuizen, phoned Dean Grugel about the discrepancy. When Duyfhuizen requested that Johnson's base rate be changed, however, he mistakenly used the term "equity" to describe the problem. Consequently, Dean Grugel apparently understood Duyfhuizen to be requesting an additional equity increase for Johnson (rather than the correction of an error) and told Duyfhuizen that any such adjustment would have to wait until all salary decisions had been made, when the remaining budget could be determined.

Duyfhuizen reported this conversation to Nadine St. Louis. And on June 13, 1991, St. Louis wrote a letter to Dean Grugel about the disparity and requested that Johnson's contract be rewritten with a $21,000 base rate. St. Louis stated that "I don't believe any sex discrimination was intended here, knowing you as I do," but pointed out that Ms. Johnson understands "forms of discrimination" and is married to a lawyer. St. Louis also noted that the situation looked like "the nicest grounds for a sex-discrimination suit that have come across my desk in a long time." On June 25, 1991, Johnson personally wrote Dean Grugel, accusing the University of sex discrimination and requesting either an explanation in writing why the department's salary recommendation was not followed or an amended contract.

After receiving all of these contacts, Dean Grugel wrote the Vice Chancellor for Academic Affairs, Marjorie Smelstor, on July 1, 1991 and "strongly recommend[ed]" that Johnson's base rate be made equal to that of Anderson for the upcoming school year. The letter was forwarded to Thomas Miller, the Associate Vice Chancellor, whose office had prepared the earlier contract letters.

Miller, who had just assumed the post, could not find any documentation that anyone had actually rejected the English Department's recommendation for Johnson (approved by the dean and the vice chancellor), so he assumed that offering Johnson the same base rate as the previous year had simply been a clerical error. On July 17, 1991, Miller sent a letter of apology to Johnson, stating that the whole thing was a "purely unintentional clerical mistake," and a new contract with a base rate of $21,120. Thus Johnson's base rate was changed before any work was performed under the new contract, and all of her checks for the 1991-92 academic year were based on the $21,120 base rate.

C. 1992-93 Academic Year

English 110-Freshman Composition is a required course for all undergraduates at UWEC. (Honors students take a parallel course within the Honors Program.) In order to promote equality within the English Department, all academic faculty within the department teach one section of English 110 each semester that they are in residence. Nevertheless, in the years preceding the 1992-93 academic year, a backlog developed of undergraduates needing this staple course, which upset parents, students, and school administrators. Articles appeared in the student newspaper in the spring of 1992 describing the problem and the solution eventually proposed by Vice Chancellor Smelstor. Smelstor appropriated $40,000 to the English Department for the 1992-93 academic year for the purpose of eliminating the backlog and providing the course to all incoming freshman. While she did not mandate specifically how the money was to

be used to eliminate the backlog, she made clear that no additional money was available.

The $40,000 was not enough to staff all the necessary English 110 sections and to hire back the entire academic staff full time and at their previous salary. Consequently, the English Department eventually decided to re-employ the members of the academic staff from the previous year, but at only 93.447% of their 1991-92 base rate. In addition, class sizes were increased for all English faculty and academic staff, and most of the academic staff were given significantly reduced teaching appointments. Among the eight academic staff for the 1992-93 academic year, only Bergine Haakenson was recommended for a 100% appointment. All of the others were recommended for 50% or smaller appointments. Johnson was given a 50% appointment. Anderson's fall semester appointment was increased to 75% during the summer of 1992, when an additional fall section of remedial English was added at a time that he was available to teach.

Karen Welch returned to the regular English Department academic staff for the 1992-93 academic year. Welch was an Option 3 employee who had been teaching English courses at UWEC since 1987. In the fall of 1989, she took over teaching English composition courses in the Honors Program, while the regular instructor pursued her PhD. Throughout her time at UWEC, Welch had been supervised by the English Department Chair and remained administratively attached to the English Department. Because the previous Honors Program composition teacher was scheduled to return from leave, Welch asked to return to teaching in the English Department for the 1992-93 school year. Welch had begun a PhD

program in composition theory in December of 1991 at the University of Minnesota.

D. 1993-94 Academic Year

Donald Reynolds became Dean of the School of Arts and Sciences at UWEC during the summer of 1992. One of his goals was to decrease reliance on academic staff for teaching courses for which there would be a predictable, ongoing need. Vice Chancellor Smelstor shared his goal of increasing teaching by tenure track faculty, who would have PhD's and be more qualified than typical members of the academic staff. In August 1992, Dean Reynolds informed Bernard Duyfhuizen, Chair of the English Department, that he intended to authorize the English Department to recruit five or six tenure track faculty positions over the next two to three years and that this would have the effect of decreasing the need for academic staff. Duyfhuizen then told the English Department academic staff, including Johnson, that because all of them would not be renewed for the 1993-94 academic year, they should get their personnel files prepared for a fall performance review. Up until the preceding year, 1991, performance reviews had been conducted annually in the fall. In 1991 the English Department's executive subcommittee announced that academic staff would no longer be reviewed annually. However, by the fall of 1992, the composition of the subcommittee had changed, with former department chair Douglas Pearson becoming subcommittee chair. (The executive subcommittee does not include the department chair.) Pearson's committee reinstated the annual reviews and approved the use of a new "good" classification for performance ratings, which

had previously been limited to "excellent," "very good," and "not satisfactory." (The "good" ranking apparently was intended as an alternative to the harsh "not satisfactory" ranking, but was not intended to be entirely positive.)

Allen Curtis, a teacher in the Department of English and a member of the subcommittee, was assigned to draft Johnson's evaluation for the fall 1992 performance review. Relevant data for these performance reviews included the following: student evaluations from the previous year, classroom visitation reports, course materials, and curriculum vitae information. After reviewing the documents in Johnson's file, Curtis drafted a review for the department personnel subcommittee. Upon reviewing Johnson's file and the Curtis review, the subcommittee gave her a rating of "good." Previously Johnson had always been rated "very good," and she was never told that she needed to improve her teaching.

Johnson was upset by the low rating and, upon reviewing the copy of the Curtis review provided to her, realized that a summary of her 1990-91 student evaluations was missing from her file, along with one set of 1991-92 student evaluations. The summary had been prepared by Wilma Clark, a member of the 1991 department subcommittee. Johnson went to Department Chair Pearson about the problem, giving him an annotated copy of the original performance evaluation prepared by Curtis and the raw data from the missing 1991-92 student evaluations. Johnson maintains that Pearson told her that performance and experience "don't matter for rehiring anyway." At any rate, Pearson personally prepared a new draft of Johnson's performance review, taking into

account the additional 1991-92 student evaluations. He did not, however, consider Clark's summary of the 1990-91 evaluations, which had been significantly better, though he did include it in Johnson's file. According to Pearson's affidavit, a staff member's performance evaluation is based only upon data from the period under review, and past performance ranking is not a criteria in the evaluation.

On November 19, 1992, the executive subcommittee took up Pearson's new draft review of Johnson. The subcommittee did not change its evaluation, however, and again rated Johnson as merely "good," supporting this rating by the fact that Johnson's 1991-92 student evaluations were below the department mean in over half the areas evaluated. The review originally prepared by Curtis (along with Johnson's annotated copy) was ordered destroyed after the new one was prepared. Other academic staff had significantly better evaluation scores and were rated "very good" or "excellent," accordingly. Only Johnson and Anderson received the "good" rating. In December of 1992, the English Department forwarded to Dean Reynolds its preliminary position requests for the 1993-94 academic year, requesting approval to hire back only four academic staff.

On January 8, 1993, Johnson filed a claim with the Equal Employment Opportunity Commission ("EEOC") alleging wage discrimination based on sex for the 1992-93 school year and retaliation for complaining about this

inequity.[5] That same month the English Department developed a "Proposed Schedule of Classes" for the fall 1993 semester."[6] The proposed schedule lists Johnson's name as teaching two courses. In February of 1993, the English Department received authorization from the Dean to fund only four courses to be taught by academic staff for the 1993-94 school year. This decrease accorded with the new university and department policy to seek and rely on more tenure track faculty in the future. The English Department decided to offer four courses taught by temporary instructors: English 211 – Writing About Literature, English 425 – Book Editing and Publishing, and two sections of English 099 – Remedial English.

The department subcommittee ultimately recommended Carol Hale-Wood to teach English 211, Patricia Duyfhuizen to teach English 425, and Karen Welch to teach the two English 99 remedial sections. Hale-Wood, unlike Johnson, had taught the 211 course before, received a "very good" rating, and had nearly completed

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[5] On November 22, 1993, the EEOC issued its determination that the evidence proffered by Johnson did not support a finding of wage discrimination, since "all fixed-term academic appointment English Instructors suffered a reduction in wages for the 1992-93 school year, including a similarly situated male employee." The EEOC also found that the evidence did not support Johnson's claim of retaliation.

[6] The record contains a one page schedule headed "Proposed Schedule of Classes: Fall 1993." The schedule is dated January 25, 1993 and is signed by Bernard Duyfhuizen. It is unclear, however, whether the single page in the record represents the complete proposed schedule; the appellees refer to it as a "partial" schedule.

her PhD. Patricia Duyfhuizen was the only person qualified to teach the 425 book editing course and had received the "excellent" rating. And as between Johnson, Anderson, and Welch, the English Department found Welch to be the best choice for teaching the remedial courses. Welch had received the "very good" rating, had nearly as much teaching experience as Johnson and Anderson, and was enrolled in a PhD program in composition theory at the University of Minnesota. Of the eight academic staff who had taught during the 1992-93 academic year, only the above three women were rehired for 1993-94. Roger Anderson, the only male in the group, was not given a new contract. Although Johnson's name appeared in the January 1993 preliminary course assignment schedule, she was ultimately not given one of the four available teaching slots for 1993-94.

E. Academic Year 1994-95

During the 1993-94 academic year, the English Department requested and received authorization to rehire Duyfhuizen, Hale-Wood, and Welch for the 1994-95 academic year. During the Spring of 1994 it became apparent that the 1994-95 student enrollment would be higher than expected, and Dean Reynolds authorized the English Department to hire additional academic staff to teach four more sections of English 110. Since Johnson's records remained in the department file, she was considered, but was not selected. Instead, the department filled these slots by bringing in two new people: Jack Bushnell, a finalist for a previous permanent faculty search, and Ruth Olson, who expected to receive her PhD in August of 1994.

II.

Johnson argues that summary judgment was inappropriately granted for the defendants because she made out a prima facie case of discrimination and retaliation under Title VII and because she presented a substantive basis for her § 1983 claim. We review a grant of summary judgment de novo, drawing all reasonable inferences in favor of the non-moving party. *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320 (1995). We will affirm the entry of summary judgment only if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. We note, however, that where the party opposing a motion for summary judgment bears the burden of proof on an issue, she may not rest on the pleadings, but must affirmatively demonstrate a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). And a genuine issue of material fact is more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1988).

A. Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1994). Title VII also makes it unlawful for an employer to discriminate or retaliate against any of its employees for opposing an unlawful, discriminatory employment practice. 42 U.S.C. § 2000e-3(a) (1994). A plaintiff in a Title VII

case may offer either direct proof of sex-based discrimination or retaliation, or may use the burden-shifting approach established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, [5 FEP Cases 965] (1973). *King v. Board of Regents*, 898 F.2d 533, 537 [52 FEP Cases 809] (7th Cir. 1990). Johnson does not purport to offer direct proof of discrimination or retaliation and agrees that the burden-shifting approach employed by the district court was the proper legal analysis for her Title VII claims.

1. Wage Discrimination

Under the *McDonnell Douglas* burden-shifting approach, the plaintiff in a Title VII discrimination case must carry the initial burden of establishing a prima facie case of discrimination. 411 U.S. at 802. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-80, [17 FEP Cases 1062] (1978), the Supreme Court noted that a prima facie case in this context "is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." If the plaintiff establishes a prima facie case, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the challenged action. *McDonnell Douglas*, 411 U.S. at 802; accord *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747-48, [62 FEP Cases 96] (1993) (defendant must produce evidence which, if believed, would support a finding that unlawful discrimination was not the cause of challenged action). If the employer succeeds in doing so, the burden returns to

the plaintiff employee, who can then prevail only if she can show that the reason offered by the employer was not the real reason for the challenged action, but merely a "pretext" for discrimination. *McDonnell Douglas*, 411 U.S. at 804. Throughout a Title VII case, the plaintiff retains the ultimate burden of *persuasion* to prove, by a preponderance of the evidence, that the employer intentionally discriminated against her. *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 522 [64 FEP Cases 1513] (7th Cir. 1994); *St. Mary's*, 113 S.Ct. at 2747-50.

The determination of what constitutes a Title VII prima facie case is a question of law. *Loyd*, 25 F.3d at 522. In the wage discrimination context, neither the Supreme Court nor this Circuit has established a definitive standard, but we have held that a prima facie case does require a plaintiff such as Johnson to produce evidence that she was paid less than a similarly-situated male or males. *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 [61 FEP Cases 773] (7th Cir. 1993).[7]

Johnson's claim of wage discrimination for academic years 1990-91 and 1991-92 falters on this fundamental requirement. The "similarly-situated" male to which Johnson compares herself is Roger Anderson. Yet Johnson was paid *more* than Anderson in academic year 1990-91 and *the same* as Anderson in academic year 1991-92. The fact that the margin between Johnson and Anderson's pay rates (her base rate had been $800 higher) decreased for the 1990-91 school year and was eliminated for the

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[7] Because Johnson has not made any claim under the Equal Pay Act, 29 U.S.C. § 206(d)(1), we make no comment on its applicability here.

1991-92 school year does not constitute impermissible wage discrimination. For the 1990-91 academic year, Johnson's base rate was higher ($19,450 compared to $19,000 for Anderson); she had a greater teaching load (100% compared to 75% for Anderson); she made more money ($19,450 compared to $14,400); and she effectively was paid more per credit hour ($810.42 per credit hour compared to $800.00 per credit hour). By every relevant measure, Johnson was paid more, not less, than Anderson for the 1990-91 academic year.

For the 1991-92 academic year, Johnson and Anderson ultimately received the same base rate of pay: $21,120.[8] So again, Johnson fails to show – or even allege – that she was paid *less* than a similarly-situated male. While getting her base rate changed (from the $19,450 amount indicated in her initial contract letter to the $21,120 rate she ultimately received) may have frustrated Johnson, by the time she began work under the 1991-92 contract, her base rate was at least as great as that of Anderson. Because Johnson was at no time paid a lower rate than Anderson, she simply cannot make out a prima facie case of wage discrimination. Title VII does not entitle Johnson to an $800 higher base rate than Anderson

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[8] While the base rate recommended by Nadine St. Louis for both Johnson and Anderson was $21,000, it is clear from the record that Johnson's base rate was ultimately set at $21,120. It is not entirely clear, however, whether Anderson's base rate actually ended up being $21,000 (as his offer letter indicates) or $21,120 (like Johnson). The matter is irrelevant, however, since Johnson nowhere alleges that Anderson was paid at a base rate greater than $21,120 for the 1991-92 academic year, i.e., she fails to allege that he was paid a higher rate than she was.

throughout her time with UWEC, simply because she came in with two years of high school teaching experience.[9]

Even if eliminating a previous wage differential did somehow constitute a prima facie case of Title VII wage discrimination, UWEC has come forward with a legitimate, nondiscriminatory reason for equalizing Johnson and Anderson's base rates in their 1991-92 contracts. Department Chair St. Louis maintains that she was trying to get the best for both that was possible within budget constraints, and to get both teachers above the rate being paid to temporary teachers. Dean Grugel notes that it was not uncommon at UWEC for minor pay distinctions based on such slight differences in experience to be eliminated over time. Johnson does not provide any evidence that these asserted nondiscriminatory reasons were pretextual.

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[9] Johnson has claimed, before the district court and in her brief, that even if she was technically paid the same as Anderson, she can make out a wage discrimination claim because she was assigned to do more work. Specifically, Johnson alleges that she was given academic advising duties that Anderson was not given. Reviewing the record, we find that both Johnson and Anderson were sometimes, though not always, given academic advising duties. More importantly, UWEC has asserted that when Johnson was given academic advising duties, these were counted as two credits worth of teaching, i.e., she was paid separately for this work. Since Johnson does not contest this assertion, we do not address her claim of wage discrimination based on doing extra work for the same money.

2. Retaliation

In order to establish a prima facie case of Title VII retaliation, a plaintiff must show that 1) she engaged in statutorily protected expression; 2) she suffered an adverse action by her employer; and 3) there is a causal link between the protected expression and the adverse action. *Brenner v. Brown,* 36 F.3d 18, 19 [68 FEP Cases 1241] (7th Cir. 1994); *Juarez v. Ameritech Mobile Communications, Inc.,* 957 F.2d 317, 321 [58 FEP Cases 152] (7th Cir. 1992). In order to demonstrate the "causal link," the plaintiff must demonstrate that the employer would not have taken the adverse action "but for" the protected expression. *Klein v. Trustees of Indiana Univ.,* 766 F.2d 275, 280 [38 FEP 152 Cases 290] (7th Cir. 1985). Under the *McDonnell Douglas* burden-shifting analysis, after the plaintiff establishes a prima facie case, the burden of production shifts to the defendant employer to come forward with a legitimate, non-retaliatory reason for its actions. *Griffin v. Board of Regents of Regency Univ.,* 795 F.2d 1281, 1294 [41 FEP Cases 229] (7th Cir. 1986). If the defendant rebuts the plaintiff's prima facie case in this manner, the plaintiff then has a chance to show that the defendant's proffered reasons are pretextual. *Id.*

Johnson asserts a number of retaliatory actions; we will address them all in turn. First, Johnson asserts that her 1992-93 salary was reduced in retaliation for her June 1991 protest regarding her 1991-92 base rate. The stumbling block for Johnson's prima facie case, however, is her failure to present any evidence of a causal link between her salary protest and the 1992-93 base rate. The fact that Johnson's 1992-93 base rate was cut to 93.447% of her 1991-92 base rate is not evidence of retaliation, since all

the English academic staff had their base rates reduced in this manner. Furthermore, the substantial reduction in Johnson's appointment percentage for the 1992-93 academic year (to a 50% appointment) also fails as evidence of retaliation, since all the academic staff, except Bergine Haakenson, were given a 50% or smaller appointment for that year.[10]

Even if Johnson could put on a prima facie case, she has not offered any evidence to show that UWEC's proffered reasons for the base rate and appointment percentage cuts were pretextual. UWEC offers evidence that these cuts were general policy decisions based on specific budget limitations and course needs; they were not directed at Johnson (or anyone else) in particular. Johnson has presented no competent evidence to create a genuine issue of fact regarding whether these reasons were pretextual. Johnson's subjective belief that the action was retaliatory and that the claimed reasons were pretext does not alone create a genuine issue of material fact. *McMillian v. Svetanoff*, 878 F.2d 186, 191 [50 FEP Cases 137] (7th Cir. 1989); *Pilditch v. Board of Education of the City of Chicago*, 3 F.3d 1113, 1119 [62 FEP Cases 1216] (7th Cir. 1993).

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[10] As noted above, Anderson picked up an additional section of remedial English at the last minute, giving him a 75% teaching load for fall 1992. UWEC asserts that Anderson was given this section because he was available to teach at the needed time; Johnson does not deny this claim or assert that she too was available at that time.

Johnson further maintains that UWEC failed to renew her contract for the 1993-94 academic year in retaliation for her June 1991 protest and her January 1993 EEOC complaint. Beginning with her claim based on the June 1991 protest, Johnson again has failed to put on evidence supporting a causal connection between the protest and the non-renewal of her 1993-94 contract. And the substantial time lapse between the events is counter-evidence of any causal connection. *Samuelson v. Durkee/French/Airwick*, 976 F.2d 1111, 1115 [52 FEP Cases 1582] (7th Cir. 1992) (noting that substantial time lapse "discounts" a causal connection between two events). The ultimate decision not to renew Johnson's contract for the 1993-94 school year was made in February 1993 – 20 months after Johnson's protest; and the performance reviews upon which the decision was based occurred in October and November of 1992 – at least 16 months after Johnson's protest.

Even if Johnson could establish a prima facie case of retaliation, she offers no competent evidence to rebut the legitimate reasons offered by UWEC for non-renewal of her contract (mainly that only four academic staff courses were authorized, and other persons were more qualified to teach the needed courses). The reinstatement of performance reviews in the fall of 1992, after notice in the fall of 1991 that they would no longer be done, is not evidence of pretext, particularly since Johnson's June 1991 protest *preceded* the curtailment of performance reviews in 1991.[11]

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[11] That is, if the English Department wanted to retaliate through the performance review process, they could have started in the fall of 1991.

Such performance reviews are standard in colleges and universities, and the rationale for them is uncontroversial. They provide a rational and systematic means of monitoring teaching performance. The fact that the English Department's review policy changed in 1991, and then changed back in 1992, is not evidence of pretext, since the composition of the executive subcommittee had changed between fall 1991 and fall 1992. The UWEC put on evidence that during 1992 the English Department was being pressured by the new dean of the School of Arts and Letters – Donald Reynolds, who began his term during the summer of 1992 – along with Vice Chancellor Smelstor, to decrease its reliance on academic staff. Johnson has produced no evidence that this policy shift was merely a pretext to eliminate her or that the reinstatement of the performance review system was designed to get rid of her.

The fact that Johnson's initial performance review was based on an incomplete file, like the initial 1990-91 appointment letter that offered her a base rate lower than that offered Anderson, was surely frustrating and annoying for Johnson. However, both of these mistakes were eventually "fixed," and they were fixed before any actual harm resulted from them. Furthermore, Johnson provides no evidence that could support an inference that these incidents were actually intercepted efforts to target her. At oral argument Johnson's counsel claimed that this was a case about "bad things happening to a good person." That may be true, but alone it is not enough to support a Title VII retaliation claim.

Moving to Johnson's claim that the non-renewal of her contract for the 1993-94 school year was in retaliation

for her January 1993 EEOC complaint (or in retaliation for the *combination* of her June 1991 protest and her EEOC complaint), Johnson comes closer to establishing a prima facie case in this regard. Johnson points out that her name did appear on the January 1993 proposed schedule of 1993-94 courses, that she complained to the EEOC that month, and that when the department's final recommendations for 1993-94 instructors came out later that spring, she was no longer one of them. Although we have found on other occasions that timing alone does not create a genuine issue regarding causation in a retaliation case, *Juarez v. Ameritech Mobile Communications*, 957 F.2d 317, 321 [58 FEP Cases 152] (7th Cir. 1992) (citing *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1272 [41 FEP Cases 425] (6th Cir. 1986)), the timing of the non-renewal decision, in combination with the other facts alleged by Johnson, may be enough to create a genuine issue of material fact regarding the causal link between her EEOC complaint and her non-renewal for 1993-94. *See also Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1315 [50 FEP Cases 1215] (7th Cir. 1989) ("telling" temporal sequence between protected action and alleged retaliation can demonstrate causal link for Title VII prima facie case); *Johnson v. Sullivan*, 945 F.2d 976, 980 [57 FEP Cases 124] (7th Cir. 1991) (fact that discharge took place one day after filing of lawsuit supports inference of causation).

Yet even assuming that Johnson does establish a prima facie case of retaliation for her EEOC protest, she again presents no evidence to get her over the hurdle of rebutting UWEC's asserted legitimate reasons as pretext. UWEC has offered evidence showing 1) that the fall 1992 performance reviews were based on relevant evidence

(student evaluations, etc.) and 2) that the 1993-94 teaching assignments were based on the results of these performance reviews, curricular need for particular courses, and individual expertise in the needed courses. Since these are legitimate, non-discriminatory reasons for not renewing Johnson's contract (along with those of the four other academic staff members who weren't retained), the *McDonnell Douglas* burden shifts back to Johnson to put forward evidence that these reasons are merely pretext for what was actually discrimination. This Johnson does not do. She offers nothing, beyond her own conjecture, to support her allegation that the English Department's failure to renew over half of its academic staff for the 1993-94 school year (5 of 8 teachers) was part of an elaborate scheme to retaliate against her. Johnson's low performance rating ("good") was supported by her low 1991-92 student evaluations, and her non-renewal for 1993-94 was supported by this low rating.[12]

Johnson's subjective belief that she was more qualified than other academic staff members (such as Karen Welch) is not evidence that UWEC's evaluation of her was a pretext for retaliation, *Gustovich v. AT & T Communications*, 972 F.2d 845, 848 [59 FEP Cases 1060] (7th Cir. 1992), and neither is her disagreement with UWEC's business decision not to rehire her. *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 [41 FEP Cases 714] (7th Cir. 1986). Even a "bad" business decision does not violate Title VII if the basis of the decision is neither discriminatory nor

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[12] Anderson was the only other academic staff person to receive the "good" rating, and he was not rehired for the 1993-94 academic year either.

retaliatory. *Gustovich*, 972 F.2d at 848 (material dispute about employee's ability differs from material dispute about employer's honesty in its asserted reason for a decision, i.e., the pretext issue); *cf. Kier v. Commercial Union Ins. Cos.*, 808 F.2d 1254, 1259 [42 FEP Cases 1127] (7th Cir. 1987). Taking all of the proffered evidence in the light most favorable to Johnson, as we must on summary judgment, we simply do not find a genuine issue of material fact regarding whether UWEC's asserted reasons for not rehiring Johnson were pretextual.

B. § 1983 Retaliation

Johnson also claims that UWEC retaliated against her, in violation of 42 U.S.C. § 1983, when it reduced her 1992-93 base rate and appointment percentage, gave her only a "good" performance rating in the fall of 1992, and neglected to rehire her for the 1993-94 academic year. Johnson's § 1983 retaliation claims are based on exactly the same facts as her Title VII retaliation claims, and she again asserts that the retaliation was due to her June 1991 protest about her base rate and her January 1983 complaint with the EEOC.

Because § 1983 does not create substantive rights, but rather provides a remedy for violations of pre-existing rights, § 1983 claims must specifically allege a violation of the Constitution or "laws" of the United States. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Although Johnson never clearly asserted what constitutional or statutory provision her § 1983 retaliation claim was based upon, the district court interpreted her claim as being brought under the First Amendment. Because Johnson has neither

clarified the basis of her § 1983 claim, nor objected to the district court's interpretation, we too shall treat the claim as a First Amendment one. The Supreme Court established in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 287, [1 IER Cases 76] (1977), that a plaintiff bringing a § 1983 claim based on the First Amendment must establish 1) that her conduct was constitutionally protected and 2) that her conduct was a "substantial factor" or "motivating factor" in the challenged action by the defendant. We have noted that even if a defendant was "brimming over with unconstitutional wrath" against the plaintiff, a § 1983 plaintiff cannot prevail unless he or she can establish that the challenged action would not have occurred "but for" the constitutionally protected conduct. *Button v. Harden*, 814 F.2d 382, 383 (7th Cir. 1987). If the plaintiff meets this burden, the defendant must prove, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected conduct. Mt. Healthy, 429 U.S. at 287.

Johnson fails to provide evidence that her 1991 protest and her 1993 EEOC complaint were a substantial factor in the alleged retaliatory actions. Since a retaliation claim, whether under Title VII or § 1983, requires the plaintiff to establish that "but for" some protected action on her part, some other adverse action would not have occurred, the causation analysis for a § 1983 retaliation claim tracks the causation analysis for a Title VII retaliation claim. *Compare Klein v. Trustees of Indiana*, 766 F.2d 275, 280 [38 FEP Cases 290] (7th Cir. 1985) (Title VII) with *Button*, 814 F.2d at 383 (§ 1983). Thus, we adopt the Title

VII retaliation analysis outlined above to find that Johnson failed to show that *but for* her June 1991 protest she 1) would not have had her 1992-93 base rate and teaching appointment reduced, 2) would not have received the "good" rating in her fall 1992 performance review, and 3) would have been given a new contract for the 1993-94 academic year. She simply has not offered evidence from which a judge or jury could infer that her June 1991 protest *caused* these subsequent occurrences. As for retaliation based on the 1993 EEOC complaint, we find that even if Johnson could establish a prima facie case that the non-renewal of her 1993-94 contract was in retaliation for the EEOC complaint, she still cannot survive summary judgment. UWEC has proffered evidence that the hiring decisions were based on orders from the administration to reduce reliance on academic staff, curricular need for particular courses, and the relative teaching abilities of the eligible academic staff members (as determined by the fall 1992 performance reviews). Johnson has not offered evidence to rebut the UWEC's claim that its decision was based on these legitimate factors, since her unsupported conjecture is not competent evidence in this regard. Thus, there is no genuine issue of material fact regarding whether Johnson's June 1991 complaint and her 1993 EEOC filing were motivating factors in the challenged actions.

We further note that Johnson's June 1991 complaint does not even appear to be "constitutionally protected conduct" under *Mt. Healthy*. To gain such status, a government employee's speech must be such that it may be "fairly characterized as constituting speech on a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 384, [2

IER Cases 257] (1987) (quoting *Connick v. Myers*, 461 U.S. 138, 146, [1 IER Cases 178] (1983)). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the speech. *Id.* at 384-85. In *Gray v. Lacke*, 885 F.2d 399, 411 [50 FEP Cases 1575] (7th Cir. 1989), we recognized that, while sexual harassment may inherently be a matter of public concern, the plaintiff's specific complaint to two of her supervisors about sexual harassment was designed to end that harassment, i.e., it "related solely to the resolution of a personal problem." Johnson's June 1991 protest regarding her base rate was of this nature – it related solely to a personal problem. Johnson was simply trying to get the salary increase that the English Department had recommended and that she believed she deserved. Such workplace speech, while personally important, does not address a matter of public concern, and thus does not merit First Amendment protection.

For the reasons outlined above, we AFFIRM the district court's grant of summary judgment for the University of Wisconsin-Eau Claire and the individual defendants.

APPENDIX H

Unpublished Disposition

NOTICE: Tenth Circuit Rule 36.3 states that unpublished opinions and orders and judgments have no precedential value and shall not be cited except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Clara M. SIMMONS, Plaintiff-Appellant,

v.

SECURITY BENEFIT GROUP, INC., Roger Viola, Barbara Rankin, and Glenda Overstreet, Defendants-Appellees.

No. 91-3080.

United States Court of Appeals, Tenth Circuit.
July 7, 1992.

D.Kan., No. 87-CV-4225.

D.Kan.,1991 WL 17681

AFFIRMED.

Before BALDOCK and SETH, Circuit Judges, and BRIMMER, District Judge*.

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* Honorable Clarence A. Brimmer, Chief Judge, United States District Court for the District of Wyoming, sitting by designation.

ORDER AND JUDGMENT**

SETH, Circuit Judge.

Appellant Clara Simmons brought this suit against her employer, Security Benefit Group ("SBG"), and her supervisors, Barbara Rankin, Roger Viola, and Glenda Overstreet, alleging violations of 42 U.S.C. § 2000e and 42 U.S.C. § 1981. Appellant also asserted a claim under the Age Discrimination in Employment Act, 29 U.S.C. Secs. 621-634 ("ADEA"), and pendent state claims. The district court granted defendants' motion for summary judgment on all federal causes of action and dismissed the pendent state claims.

During oral argument to this court Appellant's attorney expressly withdrew from the appeal all issues except the retaliation claims under Title VII. Appellant asserts that the retaliation is attributable to this suit and claims she filed with the Kansas Commission on Civil Rights ("KCCC") [sic]. In response to the claims the KCCC [sic] found no probable cause.

Appellant, a black woman with a high school education, began work at SBG as a clerk in the mail room in 1967. Over the twenty-year period that Appellant was employed by SBG she moved up through several positions including mail service clerk, Xerox operator, lobby

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** This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3.

receptionist, "SMC" transfer clerk, withdrawal/redemption clerk, secretarial assistant – mutual funds, and technical assistant. At the time Appellant was fired she held the position of Blue Sky compliance coordinator.

The events giving rise to this lawsuit extend back as far as 1974 but became aggravated in 1984 when Appellant was transferred to the SBG legal department in an attempt to resolve some of Appellant's complaints of disparate treatment by prior supervisors. It is necessary to describe the events in some detail. Soon after Clara Simmons' arrival in the legal department, Appellee Roger Viola was appointed Chief Counsel for SBG and, thus, became Appellant's supervisor. Problems between Viola and Simmons arose immediately. A conversation took place in which Viola stated (allegedly in response to a statement by Simmons that she expected Viola to be as prejudiced toward her as her other supervisors had been) that he had a good friend who was a black woman who took care of his child and that he considered the woman to be a part of his family. This incident was included in a complaint by Appellant to the KCCR.

Viola's only written evaluation of Simmons described her as "competent" and she was granted a raise. Simmons disagreed with her evaluation and filed a written response in which she stated she should have been rated "commendable" instead of "competent."

In February of 1985, Appellee Barbara Rankin joined the SBG legal department and became Appellant's supervisor. In April of 1985, a part-time employee was hired to help reduce the workload in the legal department. Simmons requested that she be made supervisor over the

new employee. Rankin refused because there were only two other employees under Rankin's supervision and adding an additional supervisory level in such a small group seemed pointless. This incident also was included in one of Simmons' later KCCR complaints.

Appellant's mid-year evaluation was performed by Rankin. Again, Appellant was evaluated as "competent" but she was notified of possible problems regarding efficiency. She was also told that she was visiting too much on the telephone and with coworkers.

In the fall of 1985, Appellee, Glenda Overstreet, was hired to fill a vacancy in the SBG legal department. Overstreet, a black female who met all of the published job qualifications, filled a job that Appellant had applied for and been denied. This incident also was the subject of a later KCCR complaint by Simmons.

Appellant was evaluated in February of 1986 by Rankin and again was rated as "competent." Simmons refused to sign the evaluation and filed a detailed written response to the evaluation with SBG's equal employment opportunity officer in which she stated that she was being treated unfairly by her supervisor and that she was being subjected to a double standard of treatment.

On May 28, 1986, Viola wrote a memorandum to the SBG Human Resources Department requesting that Simmons be transferred out of the legal department. Viola's request was denied.

In June of 1986, Rankin recommended to Viola that Overstreet be made supervisor over the two state compliance coordinator positions, including Appellant's position. Rankin's recommendation was made in part because Rankin felt that she could no longer effectively supervise Appellant. Appellant objected to Overstreet's appointment as her supervisor on the grounds that the change was in reality a new position and that the position should have been posted according to company policy. SBG characterized the change as a "job enhancement" and refused to post the position. Simmons filed a grievance which the company refused to process for the stated reason that Appellant's general claims of disparate treatment were already the subject of previous KCCR complaints. SBG's position was that the company grievance procedure should be used to resolve disputes before any outside legal or administrative remedies were resorted to.

Appellant's relationship with her supervisor, Overstreet, was no better than her relationship with previous supervisors. Appellant insisted on communicating through formal memoranda despite Overstreet's repeated statements that such formality was not necessary. As part of her supervisory duties, Overstreet attempted to counsel Appellant about her negative attitude and unwillingness to work as part of the compliance team.

By May of 1987, the situation between Appellant and her supervisors in the legal department had begun to deteriorate rapidly. Overstreet had a meeting with Appellant where she informed Appellant of the seriousness of the situation regarding Appellant's negative attitude. Overstreet also discussed with Appellant her continued "threats" to have a KCCR representative present when

discussing personnel matters, her continuing to write formal memoranda to her supervisor instead of attempting to communicate orally, Simmons' belief that all decisions made by SBG legal department personnel were intended to discriminate against her, her sighing and rolling her eyes when given assignments by Overstreet and her attitude toward supervision generally.

According to Overstreet's deposition, Appellant became increasingly difficult to supervise. Overstreet stated that it "became a circus" to ask Appellant for any assistance or information. Simmons contends that she cooperated fully with Overstreet and diligently performed the tasks assigned to her.

In June of 1987, Simmons' attorney wrote formal demand letters to SBG, as well as Viola, Rankin, and Overstreet individually, asserting that Appellant was being harassed and subjected to disparate and retaliatory treatment. Specifically, the letters stated that Simmons was subjected to unauthorized evaluations and selective enforcement of the rules, and that she was denied use of the company grievance procedure.

On June 23, 1987, Viola counseled Simmons about problems involving the possible unauthorized use of sick leave, lack of willingness to communicate verbally with her supervisor, a negative attitude toward her supervisor, and repeated demands to speak with KCCR representatives or her attorney when requested by her supervisor to perform work-related functions.

On August 18, 1987, Simmons filed this lawsuit while employed. The following week Appellant missed a day of work due to illness. After she was asked to bring a note

from her doctor describing the illness, Appellant submitted the note with the words "Submitted under protest" written on it. When Overstreet asked Appellant about the note, Appellant repeatedly told Overstreet to speak with Appellant's attorney.

On September 2, 1987, Viola wrote a memorandum to the Vice-President for Human Resources requesting that Appellant be transferred or terminated immediately. In his memorandum, Viola described the unrest in the department caused by Appellant and stated that Overstreet had now refused to work with Appellant any longer. Viola also stated that if something were not done, Overstreet might leave.

Simmons, confronted with the possibility of being transferred, told the Human Resources Department that she did not want to be transferred from her job in the legal department. Appellant was terminated on September 18, 1987.

On appeal Appellant urges only the district court's grant of summary judgment on the retaliation claim as error. The other claims or causes were dropped, as mentioned. She contends the district court erred in holding that a reasonable jury could not find that SBG retaliated against her for filing civil rights claims. "In reviewing a grant of summary judgment, we utilize the same standard that the district court employs." Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir.). Summary judgment is proper if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is

entitled to judgment as a matter of law. Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir.).

This retaliation claim comes within the general procedure for Title VII suits set out in McDonell Douglas Corp. v. Green, 411 U.S. 792, and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248. *See* Burrus v. United Tel. Co. of Kan., Inc., 683 F.2d 339, 343 (10th Cir.). Thus, to establish a prima facie case of retaliation, we held in Burrus that a plaintiff must show:

> "(1) she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding;
>
> "(2) she was disadvantaged by an action of her employer subsequent to or contemporaneously with such opposition or participation; and
>
> "(3) there is a causal connection between the protected activity and the adverse employment action."

683 F.2d at 343. Once a prima facie case has been established the burden shifts to the defendant to come forward with a legitimate, nondiscriminatory reason for the adverse employment action. If the defendant produces evidence of a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to show that the articulated reason is a pretext for discrimination.

One of Appellant's claims of retaliation stems from the fact that she was fired only a few weeks after filing this action. A causal connection between protected activity and adverse employment action may be shown by circumstances that justify an inference of retaliatory

motive, such as a close temporal relationship between the protected conduct and the adverse action. Burrus, 683 F.2d at 343. Appellant has met her burden of showing a prima facie case of retaliation on this point.

The facts are uncontroverted that serious tensions within the SBG legal department were escalating during Appellant's tenure. Appellant had numerous disagreements with her supervisors and discord within the department was making it difficult for the employees to function efficiently.

The issue becomes whether Appellant has presented enough evidence to convince a reasonable trier of fact that Appellees' stated reasons for termination were a pretext for discrimination.

It is undisputed on the record before us that Appellant experienced problems with her supervisors for many years prior to her discharge. Evaluations by Appellant's superiors consistently noted problems with Appellant's attitude and particularly her attitude toward supervision. Appellant also fails to controvert Appellees' evidence that tensions between Appellant and other members of the SBG legal department had risen to a point where it was interfering with the day-to-day operations of the department. As Appellee Overstreet put it, supervising Appellant became a "circus."

As mentioned above, the only significant evidence Appellant relies on to support her claim of retaliation is the close temporal relationship between Appellant's filing of this lawsuit and her termination. After examining the extensive record of the events over the years we find

that the date of Appellant's discharge and its close proximity to her filing of this lawsuit are completely fortuitous. Appellant has not come forth with sufficient evidence to show that Appellees' stated reasons for her termination were a pretext for discrimination. Thus, we must hold that Appellant has not presented sufficient evidence to create a genuine issue of material fact as to whether SBG's stated reasons for termination were pretextual.

Appellant also points to other incidents during her employment with SBG that she claims are retaliatory. First, Appellant claims that a memorandum written by Appellee Viola on May 28, 1986 creates a fact issue as to whether Appellant was retaliated against. In the May 28 memorandum, Viola requests Appellant's immediate transfer from the SBG legal department. Appellant argues that because the memorandum mentions that she had already filed four discrimination claims with the KCCR it is evidence of discriminatory intent. We disagree. The reference to the KCCR complaints was an attempt to put the request for Simmons' transfer in context. The portion of the letter referring to the KCCR complaints gives some of the background for Appellant's dissatisfaction. The reasons listed for the requested transfer do not include the civil rights complaints; rather, the letter cites problems with Appellant's attitude in general, the disruptive nature of her conduct in a small department, and her unwillingness to be supervised. The letter goes on to request that Appellant be transferred so that "[s]he will then have a chance anew to establish a positive and productive relationship with a new supervisor." (Appellant's App. at 327.) When the May 28 letter is read in its

entirety, it is clear that it does not raise an inference of retaliation.

We also note that with regard to Viola's May 28 letter no action was taken to transfer Appellant out of the legal department. One of the elements of a prima facie case of retaliation is that the employee be disadvantaged by some act of the employer. Appellant has pointed to no act related to the letter to show that she was disadvantaged in any way.

We have also examined the record as to other incidents or events which Appellant urges as evidence of retaliation or discrimination. These include the initial employment of Glenda Overstreet and then later a change in Glenda Overstreet's duties to include the supervision of Appellant. Again, it is apparent that these events did not constitute sufficient evidence to create an issue of material fact.

Appellant also asserts that SBG denied her access to the company grievance procedure in retaliation for her filing a civil rights claim. When Appellee, Overstreet, was appointed as Appellant's supervisor, Appellant filed a company grievance regarding the change. SBG refused to process the grievance on the grounds that Appellant's general allegations of disparate and discriminatory treatment were the subjects of previously filed KCCR complaints and that the purpose of the SBG grievance procedure was to address complaints before any outside legal or administrative actions were taken. There is no evidence that other employees were treated differently with respect to the grievance procedure or that the stated

policy was in retaliation for Appellant's civil rights complaints. Thus, Appellant has produced no evidence to convince a reasonable trier of fact that SBG's stated reasons for denying her access to the company grievance procedure were pretextual.

The judgment of the District Court for the District of Kansas is AFFIRMED.